(1) Supreme Court, U.S.
FILED
04-953 JAN 10 2005
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

PAUL WABEKE,
Petitioner

v

ANDREW MULDER,
Respondent

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

By:
Paul Wabeke, *pro se*
PO Box 1132
Holland, Mi. 49423-1132

January, 2005

QUESTIONS

1. Whether citizen, who has long been government critic, has right to *pro se* "petition the Government for redress of grievances" and, if so, whether state may permanently enjoin that right?

2. Whether the *Rooker-Feldman Doctrine* should be revisited when it is clear that the First Am. "right to petition . . for redress of grievances" *pro se* cannot be protected in state or lower federal courts?

3. Whether attorney fees awarded by state against *pro se* government critic, who exercised right to petition for redress of grievances, chills First Amendment rights?

4. Whether, regardless of *Rooker-Feldman*, attorney, acting under color of law, has liability for retaliation and false and misleading statements made in judicial proceedings resulting in the deprivation of civil rights?

TABLE OF CONTENTS

QUESTIONS i
INDEX OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL & STATUTORY PROVISIONS 1
First Amendment 1
Fourteenth Amendment 1
Civil Rights Acts of 1871 2
Article VI, cl 2. - Supremacy Clause 2
28 USC 1654 2
STATEMENT OF THE CASE 3
Introduction 3
Petitioner 3
Respondent 3
Facts Of The Two State Permanent Injunctions 4
Ottawa County case 4
The Allegan County Permanent Injunction 6
Federal Civil Rights Case 6
Federal District Court 6
Court of Appeals 7
REASONS FOR GRANTING THE PETITION 8

1. FUNDAMENTAL FIRST AMENDMENT AND OTHER RIGHTS OF PETITIONER, AND OTHER *PRO SE* LITIGANTS, ARE BEING DEPRIVED BY PERMANENT INJUNCTIONS AND CAN CURRENTLY ONLY BE PROTECTED BY THIS COURT. 8

2. PETITIONER REQUESTS THE ROOKER-FELDMAN DOCTRINE BE REVISITED FOR THE FOLLOWING REASONS. 15
A. The Doctrine Violates the First Am. 15
B. The Rooker-Feldman Doctrine Has A Weak Foundation 16
C. The Doctrine Violates the Separation Of Powers. 17

D. The Doctrine Violates the Supremacy Clause of the Constitution. 18
E. The Court Should Resolve The Conflicts Between The Circuits. 19
F. The Court Should Resolve The Conflict Between the Rooker - Feldman Doctrine And The Court's Own Statements. 20

3. ATTORNEY FEES IMPOSED AGAINST CITIZENS ATTEMPTING TO ENFORCE THEIR RIGHTS CHILLS THOSE RIGHTS AND IS RETALIATORY. 22

4. THE COURT SHOULD DECIDE WHETHER THE INCLUDED CIVIL RIGHTS VIOLATIONS OF FRAUD ON THE COURT, CONSPIRACY AND RETALIATION MAY BE PURSUED REGARDLESS OF ROOKER-FELDMAN. 25
A. Respondent Has Liability For False Statements 26
B. Respondent has liability for retaliation. 28

CONCLUSION 29

STATEMENTS ACCORDING TO 28 USC 1746 29

Appendix
A (6th Cir) 1a
B (rehearing) 4a
C (district court) 5a
D (extension of time) 15a

INDEX OF AUTHORITIES

Article I	17
Article III	17
Art. VI	2, 10, 16, 18
First Amendment	1,8,9,13 many
9th Am.	17
10th Am.	17
Fourteenth Amendment	1, 10, 11, 13, 16,22
Michigan Constitution Art. 1, sec 13	2, 10, 12
28 USC 1257	16
28 USC 1331	16
28 USC 1654	2, 10, 12
42 USC 1983	2, 8,16
42 USC 1985(3)	13, 16

Asarco Inc. v Kadish, 490 US 605, 622 (1989)	20
Barrett v Harrington, 130 F.3d 246 (1997 6th Cir.)	14
BE & K Construction Co. v NLRB, 536 US 516 (2002)	10, 15
Becker v Montgomery, 532 US 757 (2001)	6
Board of Commissioner's Wabaunsee Co. v Umbehr, 518 US __, 135 L Ed 2d 843, 116 S Ct __ (1996)	28
Burns v Ohio, 360 US 252 (1959)	24
Business Guides v Chromatic Comm., 498 US 533 (1991)	23
Carpenters v Scott, 463 US 825 (1983)	13
City of Littleton, Col. v Z.J. Gifts, O2-1609 (June 7, 2004)	18, 21
Clay v Sun Ins. 263 US 207, 228 (1964)	24
Davis v Wakelee, 156 US 680, 689 (1895).	28
District of Columbia Court of Appeals v Feldman, 460 US 462 (1983)	many
Elsman v Standard Federal Bank, unpublished 00-2293/01-1544 (6th Cir 2002)	19
England v Louisiana St. Brd Med. Exam., 375 US 411 (1964)	22
Estes v Texas, 381 US 532 (1965)	27
Faretta v California, 422 US 806, 821 (1975)	10, 14
Feldman v US, 322 US 487 (1944)	14
Griffin v Breckenridge, 403 US 88 (1971)	13
Haddle v Garrison, 525 US 121 (1998)	28

Haines v Kerner, 404 US 519, 520 (1972) 6, 10
Hicks v Miranda, 422 US 332, 356 (1975) 16
Hilton v Guyot, 159 US 113 (1895) 27
Jones v Continental Corp, 789 F2d 1225 (6th Cir) 24
Lachance v Erickson, 522 US 262 (1997) 27
Martin v Hunter's Lesse, 14 US 304 (1816) 17
McDonnell Douglas Corp v Green, 411 US 792 (1973) 27
Metropolitian Life Ins. Co. v Brown, (6th Cir. 2002, unpublished, 02-3318) 27
Neitzke v Williams, 490 US 319, 329 (1989) 23, 25
O'Hare Truck Service, Inc. v City of Northlake, 518 US ____, 135 L Ed 2d 874, 116 S Ct ____ (1996) 28
Palazzolo v Rhode Island, 533 US 606 (2001) 25
Pickering v Board of Education, 391 US 563, 571-572 (1968) 28
Pollock v Williams, 322 US 4 (1944) 24
Reid v Covert, 354 US 1 (1957) 11,12,13
Rooker v Fidelity Trust Co., 263 US 413 (1923) many
Rutan v Republican Party of Illinois, 497 US 62, (1990); 28
Southward v South Central Ready Mix, 7 F.3d 487, 492 (6th Cir 1993) 6
Thornblad v Anderson, 104 Fed. Appx. 610 (2004 8th Cir) 20
US Catholic Conference v Abortion Rights Mobilization, Inc. 487 US 72 (1988) 11
US v Cruikshank, 92 US 542, 23 L Ed 588 (1876) 9, 10, 22
Wexler v LePore, 385 F.3d 1336 (2004) 20,21

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the 6th Circuit (No. 03-2235) (unpublished) is reproduced in the appendix. App A, p 1a. The order denying the motion for rehearing is reproduced also. App B, 4a.

The opinion and order of the District Court (No. 1:03-cv-221, W.D. Mich.) granting Defendant Mulder's motion to dismiss under Rule 12(b)(1) is reproduced in the appendix at App C p 5a. The opinion and order dismissing the two state judges is not appended.

JURISDICTION

Jurisdiction rests in 28 USC 1254. The decision of the 6th Circuit was made on June 17, 2004. App A, p 1a Rehearing was denied on August 13, 2004. App B, 4a Extension of time was granted by Justice Stevens until January 10, 2005. App D 15a.

CONSTITUTIONAL & STATUTORY PROVISIONS

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for redress of grievances."

* * *

Fourteenth Amendment:

Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

Section 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

* * *

The **Civil Rights Acts of 1871**, enacted pursuant to the 14th Am. sec 5, (42 USC Sec 1983) says in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

* * *

Article VI, cl 2. - Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Since Petitioner has been *pro se* from the start, *28 USC 1654* is also relevant to review. (& see Michigan Const. Art. 1, sec 13 - similar.)

28 USC 1654. Appearance personally or by counsel

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

STATEMENT OF THE CASE

Introduction

Several of Petitioner's fundamental rights have been denied here, but also affecting the whole lower class and much of the middle class of America - the right to petition and speak in state and federal courts *pro se* and, thus, the right to enforce basic civil rights. The questions are directly related to these fundamental rights and should be decided by this Court.

Petitioner has long been a vocal critic of local government. Five state judges have said they have the absolute right to "take" Petitioner's First Am., *pro se* rights, and all other rights enforced by lawsuits, by permanent injunction.

In this civil rights suit, four federal judges have said their hands are tied behind their backs by *Rooker-Feldman*. This is the *second* time the *Rooker-Feldman Doctrine* has barred Petitioner's civil rights lawsuits against Respondent. (The first time was in 1996. See App C, at fn 2 p 10a) It is clear that civil rights violations by those acting under color of law - Respondent and state judges - are totally insulated from federal review by *Rooker-Feldman*, contrary to the intent and design of the 14th Amendment, the Supremacy clause and other Constitutional provisions enacted by the People for their protection and benefit.

If perhaps the facts are not clear enough, Petitioner relies upon the District Court statement of the case. App C 6a.

Petitioner

Mr. Wabeke has long been a vocal critic of the City of Holland, its officials and others. See Aff p 29-30.

Respondent

Defendant Andrew Mulder is, and has long been, the hourly contracted attorney for the City of Holland, Michigan. Defendants Calvin Bosman and Harry Beach are state circuit court judges. App C p 6a.

Facts Of The Two State Permanent Injunctions
Ottawa County case.

In 1997 Wabeke filed a public interest lawsuit against the City of Holland, etc. challenging the lack of right to vote by the taxpayers on the issue of whether the City should spend $54 million to convert a publicly owned island tourist attraction, Windmill Island, to a private gated enclave for a few rich subsidized tenants. Wabeke paid the fees. (Note - The city has about 30,000 residents. After many years and expending large amounts of taxpayer money on the project, recently the City abandoned it.)

Respondent, Andrew Mulder, a private practice attorney representing the City of Holland, argued the suit should be immediately dismissed and Wabeke sanctioned by being permanently enjoined from filing any other lawsuits against the city, et al. In support thereof Mulder listed a number of cases, some where Wabeke was a defendant and appellant, *falsely* and misleadingly stated several facts - Wabeke had filed 16 lawsuits against the City of Holland, etc. - and secured the permanent injunction at issue here prohibiting Wabeke from filing lawsuits in state court against the City of Holland, et al. See App C p 9a for part of order.

Respondent Mulder had been a target of one or more of Wabeke's the lawsuits. See App C p 10a fn 2; (Trans 9-8-97, p 8, 10). Thus he had an inherent bias and possible retaliatory motive in imposing the sanctions. Furthermore, he did not enter any evidence, only his self serving arguments, that the cases were without merit and that Wabeke had lost. Mulder further admitted the permanent injunction is an "extraordinary remedy," that it affects "open access to our courts" and the "First Amendment." (Trans 9-8-97, p 5, 9) Mulder even included appeals in the number. (Id. p 8) While it is true Wabeke lost all the cases, it is not because none of them had any merit. More likely because of judges biased in favor of government and its officials. See Aff 29-30. Without letting the case reach first base, on virtually one page of the transcripts, the state judge

dismissed the case and granted the motion for permanent injunction against Wabeke and $500 for attorney fees. (Trans 9-8-97, p 17) (Note: the Judge's decision lacked all elements of a valid judicial decision - no fact finding or discussion, no review of law or discussion, no determination that Wabeke had filed a totally frivolous lawsuit. See *Southward v South Central Ready Mix*, 7 F.3d 487, 492 (6th Cir 1993). He did not view any facts or make any findings of fact or investigate the cases cited or anything else, which would constitute Due Process of Law.)

He then signed an order drafted by Respondent Mulder. Because Michigan Court Rules allow biased *attorneys* to write the judges orders, a likely unconstitutional procedure, Respondent Mulder took advantage of the opportunity. In the order he prepared he included the following: "and the award of costs for frivolous and vexatious proceedings by the Plaintiff", a finding *not* made by the judge. (Order dated Oct. 13th, 1997, p 1)

Wabeke objected and claimed Due Process violations. (Trans 10-13-97, p 2, Mulder's oral argument.) But they were ignored and the order signed.

Petitioner appealed *by right* to the Michigan Court of Appeals which, in a Memorandum Opinion, decided against Wabeke. Without discussing or stating any facts in support or addressing Wabeke's appeal evidence and claims of fraud via false and misleading statements, etc., it concluded: "Plaintiff was afforded due process in connection with the imposition of sanctions." It also concluded in error and without review of the cases and contrary to Wabeke's filings that "Plaintiff's *documented history of filing frivolous actions* and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future." (emphasis added) (MCA #207260, p 2 - *Wabeke v City of Holland*, 199 Mich App LEXIS 378 (1999)) See part at App C p 10a-11a.

Petitioner then moved for rehearing. It was denied on May 24, 1999. No further appeals were filed. Thus, the Ottawa County permanent injunction remains in effect to

this day. (Note: The Due Process violations noted here involving this *pro se* litigant are not uncommon by any means within Michigan, or the 6th Circuit. See Aff p 29-30)

The Allegan County Permanent Injunction

Subsequently, another public issue arose[12] where Petitioner felt compelled to file another public interest lawsuit against the City of Holland. Because the City of Holland covers parts of two counties (Ottawa and Allegan), Mr. Wabeke was able to file a subsequent lawsuit against the City of Holland in Allegan County over the new issue and evade the Ottawa Co. permanent injunction. However, that suit was likewise dismissed and a second identical permanent injunction issued also. See App C 11a.

Respondent Mulder again filed a motion for summary judgment and sanctions. He again made *false and misleading statements to the court* and secured attorney fees and the second permanent injunction.

Federal Civil Rights Case

Federal District Court

Petitioner believed his civil rights were violated by the permanent injunctions. Therefore he filed his complaint in federal court against Respondent Mulder and the two state judges contending that his civil rights had been violated by the injunctions and attempting to get them reversed and damages.

Petitioner believes that the district court had jurisdiction under 28 USC 1331 and 42 USC 1983 and other provisions, but somehow failed to include such. He believes, however, that this is a correctable error by amendment. See *Becker v Montgomery*, 532 US 757 (2001); *Haines v Kerner*, 404 US 519, 520 (1972) Petitioner did seek to amend. See following.

Defendants moved to dismiss on various grounds. The district court granted the judges' motion to dismiss.

---

[1] Wabeke sought a temporary injunction against the City of Holland in regards to extensive renovations of the donated Kollen Park.

In his answer, Respondent contended he has qualified immunity. Respondent Mulder then moved to dismiss under *Rooker-Feldman*.

Petitioner sought to prove that Attorney Mulder engaged in fraud on the court by his false and misleading statements to the state court judges to obtain the injunction. Because it dismissed based on the *Rooker-Feldman Doctrine*, the district court only acknowledged the argument without attempting to either see or find the truth of it. See App C p 13a.

The Federal District Court decision quotes in part the two identical permanent injunctions issued by the state court judges. App C p 9a. However, it omits the reasons why the state lawsuits were filed. It does note the subsequent appeal by right in the first state case to three judges of the Michigan Court of Appeals and their affirmance. App C p 9a The District Court held that *Rooker-Feldman* prohibited it from exercising subject matter jurisdiction to protect Petitioner's rights and dismissed. App C p 5a It noted that the "right of access to courts is neither absolute or unconditional" Id. p 12a fn 3.

It did note, however, that "Plaintiff certainly disagrees with arguments Attorney Mulder made in state court and believes that Mulder mislead the state court judges." App C p 13a.

Court of Appeals

Petitioner timely appealed - paying the fee - and filed his timely brief based on the *pro se* format provided by the court. Petitioner filed a motion to Amend his Complaint as to First Amendment issues and other various respects on Dec. 15, 2003. An order was filed on Dec. 16, 2003 stating: "It is ordered that the motion is denied without prejudice to being reconsidered should the district court first deny the relief requested."

On June 17, 2004 the 6th Cir. affirmed the dismissal below based on the *Rooker-Feldman Doctrine*. App A, p 1a.

On June 28, 2004 Petitioner filed a motion for reconsideration. It briefly mentioned his First Amendment

rights. Since there was no subject matter jurisdiction, they apparently could not rule on the issues anyway. On July 12, 2004 he filed a motion to amend his motion for reconsideration addressing concerns about the 14th Amendment and fraud by Respondent.

On August 13, 2004 the Court denied reconsideration concluding it "had not overlooked any point of law or fact." App B, p 4a.

The 6th Circuit decision correctly identified this as a 42 USC 1983 case. App B, p 4a Petitioner totally agrees with that because Respondent Mulder was acting under color of law of the state and on behalf of the City of Holland when he sought the permanent injunction against Petitioner.

REASONS FOR GRANTING THE PETITION

1. FUNDAMENTAL FIRST AMENDMENT AND OTHER RIGHTS OF PETITIONER, AND OTHER *PRO SE* LITIGANTS, ARE BEING DEPRIVED BY PERMANENT INJUNCTIONS AND CAN CURRENTLY ONLY BE PROTECTED BY THIS COURT.

The First Amendment of the "Bill of Rights" provides for protection of the rights to "freedom of speech" and to "petition the Government for redress of grievances." These rights of Petitioner have been violated by the State of Michigan's permanent injunctions. The 14th Am. protects these rights and liberties from being violated by the State. But relief is not available in lower federal courts because of the *Rooker-Feldman Doctrine*. Therefore, Petitioner seeks the protection of this Court.

This Court has addressed the post 14th Am. ratification rights of citizens and the duties of the States under the Constitution to protect their liberties.

> "The rights of life and personal liberty are natural rights of man. `To secure these rights,' says the Declaration of Independence, `governments are instituted among men, deriving their just powers from

> the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these `unalienable rights with which they were endowed by their Creator.'" *US v Cruikshank*, 92 US 542, 23 L Ed 588, 592 (1876)

This Court must become involved when States suppress these liberties and no other remedy is available.

This Court said the First Amendment right of petitioning "is an attribute of national citizenship and, as such, *under the protection of and guaranteed by, the United States*. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." (emphasis added) *US v Cruikshank*, 92 US 542, 23 L Ed 588, 591 (1876) Petitioner seeks that guarantee of protection from this Court now, otherwise, it is a blank guarantee and empty promise.

> "*First Amendment rights require special safeguards.*" *Branzburg v Hayes*, 408 US 665, 738 (1972) (J. Stewart, dissenting). "The decisions of this Court have `consistently held that *only a compelling state interest* in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v Button*, 371 US at 438." (all emphasis added) *Id.* at 739.

Petitioner believes that the rights at issue - speech and petitioning in judicial forum - are protected and beyond the power of the State to regulate, by means of the First Amendment and 14th Amendment. Furthermore, the State has no "compelling state interest" (*Id.*) in suppressing *pro se* speech in court proceedings and has never expressed any. In fact, the opposite is true - it has a compelling interest in protecting the speech of *pro se* litigants and critics, because of the truth they seek to present and the wrongs they attempt to expose.

The majority in *Branzburg* stated: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government . ." *Id.* 689. (See also Supremacy Clause, Art. VI, and 14th Am.) That is exactly what a "petition for redress of grievances" in the courts is *suppose* to provide, but, as in this case, doesn't.

This Court recently upheld a corporation's right to petition for redress of grievances. *BE & K Construction Co. v NLRB*, 536 US 516 (2002). Petitioner, and other *pro se* litigants, deserve and request "equal protection." See *Cruikshank*, at L ed 592. It is evident from the District Court that other *pro se* litigants have also been barred by permanent injunctions from filing lawsuits in *federal* courts, just as Petitioner has been for 7 years in Michigan State courts. See App C at p 12a, fn 3. Apparently, *pro se* litigants, as an inferior class, have been targeted by the judicial powers for this suppressive punishment. See Aff p 29-30.

All of these persons have been permanently enjoined in various ways by state and federal judges at the insistence of government agents - lawyers. Secondly, it is obvious that the rights taken from them are not usually restored by judicial process, and, therefore, literally remain for life, as in this case. For these reasons and the supreme importance of the fundamental rights involved, question one should be addressed first, before the *Rooker-Feldman* issue.

Pro se litigants supposedly have Equal Constitutional rights to wealthier citizens who can find and afford attorneys. 14th Am. Plus the law grants them the right to represent themselves. 28 USC 1654; See also Mich. Const. Art. 1 sec 13; *Haines v Kerner*, 404 US 519, 520 (1972); *Faretta v California*, 422 US 806 (1975). But they are a despised and persecuted class in judicial proceedings, dominated by members of the Bar. See Aff. 29-30.

Granted by its terms the First Amendment is limited to "Congress." But this Court has held:

> "The prohibitions of the Constitution were designed to apply to *all branches* of the National Government

and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid v Covert*, 354 US 1, 17 (1957).

n62 Even during time of war the Constitution must be observed. *Ex parte Milligan*, 4 Wall. 2, at 120, declares:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

Also see *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156; *United States v. Commodities Trading Corp.*, 339 U.S. 121, 125. *Reid v Covert*, 354 US 1, 35 (1957).

Since the Constitution may not be violated by the federal government, it is unreasonable that it can be violated by the state, as here.

"It rests instead on the *central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts,* no less than the political branches of the government, *must respect the limits of their authority.*" (emphasis added) *US Catholic Conference v Abortion Rights Mobilization, Inc.* 487 US 72, 77, 108 S Ct 2268, 101 L Ed 2d 69 (1988)

In addition, the 14th Amendment clearly secured "the prohibitions of the Constitution" from further violations by the states. Therefore, Petitioner is of belief that the permanent injunction against him filing lawsuits *pro se* in state court against local government and its officials is a clear violation of several of his constitutional rights.

This question was not answered - avoided - by the lower federal courts because of the *Rooker-Feldman Doctrine* and its bar of "subject matter jurisdiction." (App C) But the state has said, by three of its courts, Petitioner does *not* have a right to "petition the [state] government for redress of grievances" *pro se*. (See App C p 8a-11a)

Petitioner also claims the protections of 28 USC 1654 and Michigan Constitution Art. 1, sec 13, which protect his rights to represent himself in court - *pro se* rights. These rights are directly violated by the injunction and unequally applied to only *pro se* litigants.

To some this violation of *pro se* litigants rights is a: "*slight encroachment on the Bill of Rights and other safeguards in the Constitution [that] need cause little concern*. But . . . a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." n74 [n74 *Boyd v. United States*, 116 U.S. 616, 635.] *Reid v Covert*, 354 US 1, 39-40 (1957).

The state is acting through its judges in this case to violate the First Amendment rights of Petitioner. Alexander Hamilton had a warning about judges that must be

considered, but also re-examined in light of the current case and the permanent injunctions imposed by the judges.

> n66 Speaking of the imperative necessity that judges be independent, Hamilton declared:
> ". . . *Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments*; . . . nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." The Federalist, No. 78. *Reid v Covert*, 354 US 1, 36 (1957).

Citizens, like Petitioner, have a substantial right to fear judges for what they can do to them, as shown here and other cases. (See App C p 12a fn 3)

The facts are confirmed that Wabeke has sued the City of Holland and/or its officials several times before. (App C p 10a fn 2) Wabeke has long been the most vocal critic of local government and its officials. (Affidavit of Wabeke p 29-30) Silencing his voice and lawsuits directly insulates local government officials from exposure.

Petitioner believes there has long been a conspira[illegible] to silence him. (See App C, p 10a fn 3 and note date.)

This Court in *Carpenters v Scott*, 463 US 825 (1983) held that, in addition to the 4 elements of *Griffin v Breckenridge*, 403 US 88 (1971), state involvement is an essential element in a conspiracy to deprive First Amendment rights under 42 USC 1985(3). US at 829-830. Obviously this case has state involvement, and the deprivation of First Amendment rights and Equal Protection rights of the *pro se* Petitioner.

> "The Equal Protection Clause of the Fourteenth Amendment prohibits any State from denying any person the equal protection of the laws. The First

> Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to State governments and their officials, *prohibits* either Congress *or a State* from making any "law . . . abridging the freedom of speech, . . or the right of the people peaceably to assemble." *Id.* at 831.

Petitioner believes the imposition of permanent injunctions on Petitioner, and other *pro se* litigants, has its oppressive roots in the Star Chamber. "[B]ecause it specialized in trying `*political*' offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights." (emphasis added) *Faretta v California*, 422 US 806, 821 (1975) (See also fns 17, 18). Justice Black dissenting in *Feldman v US*, 322 US 487, 499-500 (1944) stated that the Founders ". . . still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies *which had brought religious and political nonconformists within the penalties of the law* by means of their own testimony." Petitioner has been barred from filing lawsuits because of his whistleblowing critical political views. (See Aff p 29-30)

Petition for redress of grievances and civil rights lawsuits are by nature political. Retaliation for filing such lawsuits has been long been prohibited. See post at p 28.

Permanent injunctions are a new and innovative form of retaliation and silencing of critics and opponents that this Court should review.

Lastly, Petitioner has long been a vocal critic of those who have imposed the permanent injunction on him. Besides his lawsuits, he has been critical in official town meetings. (See Aff. 29-30) That also is protected - speech.

> "`Criticism of government is at the very center of the constitutionally protected area of free discussion.' *Rosenblatt v Baer*, 383 US 75, 85, 86 S Ct 669, 675-676, 15 L Ed 597 (1996) n26 * * * Freedom to criticize public officials *and expose their wrongdoings* is at the core of First Amendment values . . " (emphasis added) *Barrett v Harrington*, 130 F.3d 246, 262-263 (1997 6th Cir.)

Therefore, the injunction has a multiple purpose - to suppress speech and exposure of local officials, to retaliate, and to hide the judicial bias exposure that may be revealed on appeal, provided justice is available.

2. PETITIONER REQUESTS THE ROOKER-FELDMAN DOCTRINE BE REVISITED FOR THE FOLLOWING REASONS.

A. The Doctrine Violates the First Am.

The First Amendment guarantees the right to "petition the *Government* (the federal government in this case) for redress of grievances". Since the First Amendment was initially only applied to the federal government, that right directly includes the right to sue in federal courts. The *Rooker-Feldman Doctrine* violates this right.

Recently in *BE & K Construction Co. v NLRB*, 536 US 516 (2002) this Court expressed its wise intent to protect this right from judicial (or quasi judicial) interference and nullification.

Equal Protection means the First Amendment right of petition cannot be affirmed in one case and violated in another, especially only in *pro se* cases. As shown in the preceding section, *Rooker-Feldman* has completely obstructed enforcement of fundamental First Am. rights of "Speech" and "Petition."

Hopefully this it is clear enough from the previous argument (incorporated here) that First Amendment rights cannot be enforced in the lower federal courts when violated by the States. These reasons alone are sufficient to revisit and overrule *Rooker-Feldman*.

Secondly, this Court needs to first fully consider the following question: Should every citizen, *pro se* or not, violated by the uncountable multitude of state officials (See Declaration of Independence) in, and related to, judicial and quasi-judicial proceedings be required to and limited to appeal to this Court in order to enforce their Constitutional rights? (1000's of cases per year. Unbelievable!) As the lower

courts have said, that is exactly what the *Rooker-Feldman Doctrine* requires.

B. The Rooker-Feldman Doctrine Has A Weak Foundation

The cases of *Rooker v Fidelity Trust Co.*, 263 US 413 (1923) and *District of Columbia Court of Appeals v Feldman*, 460 US 462 (1983) were very limited and did not fully or even partially address the whole of the Constitution or even major parts, therefore, it should be revisited. Both *Rooker and Feldman* considered only 28 USC 1257. *Rooker* was decided on the very limited basis of a motion to dismiss.

In *Feldman*, Justice Stevens dissented contending that "collateral attack" is permissible under 28 USC 1331. *Id.* at 490. Neither case considered the Supremacy Clause, the 14th Amendment, the Separation of Powers, or 42 USC 1983 and other civil rights statutes.

It is clear from this case that the *Rooker-Feldman Doctrine* on its face and as applied completely ". . ousts the federal courts from their historic role as the `primary reliances' for vindicating constitutional freedoms." *Hicks v Miranda*, 422 US 332, 356 (1975) (dissent).

Rooker-Feldman must be revisited because it does not consider substantial portions of the Constitution. Previous to the 14th Amendment the states had a long sordid history of violating the Federal Constitution, even though they had an obligation to uphold federal rights and law via the Supremacy Clause, Art. VI.

Congress, with the support of the People, intended to remedy these violations of the Bill of Rights by the states in the 14th Am. Subsequent to the 14th Am. adoption, statutes such as 42 USC 1983, 1985 and other civil rights statutes were enacted according to the power authorized by Sec 5. They specifically provided a federal court remedy to enforce federal rights against the states - regardless of whether the offense occurred in judicial proceedings or outside them.

The Doctrine forces Petitioner and hundreds of other litigants back to pre 14th Am. America, having their rights violated by state officials with no relief - state or federal.

C. The Doctrine Violates the Separation Of Powers.

The Constitution separated powers for good reasons. But the *Rooker-Feldman Doctrine* forbids the federal courts from doing exactly what they were intended to do - "enforce" the civil rights laws against the states. In *Martin v Hunter's Lesse*, 14 US 304, 4 L Ed 97, 1 Wheaton at 304 (1816) this Court said:

> "The object of the Constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and *enforce* them." (emphasis added)

Note that protecting the States or their judicial branch is not one of the duties of any federal branch. Also Article III, sec 1, specifically states that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts *as the Congress* may from time to time ordain and establish." (emphasis added) Note that it does not say "state courts". Note also that Congress was not authorized to and did not establish any state courts.

Article I, sec 8, states: "The *Congress* shall have power to * * * constitute Tribunals inferior to the supreme Court;" Conceding authority over federal rights exclusively to the state courts, as *Rooker-Feldman* does, is totally inconsistent with this part of the Constitution.

It also should be remembered that the 10 th Am. grants only limited rights to the States after the 9th Am. granted the vast majority to the People.

D. The Doctrine Violates the Supremacy Clause of the Constitution.

The Supremacy Clause mandates that States are bound by and will follow the federal Constitution and federal laws. But the *Rooker-Feldman Doctrine* undermines the enforcement tool provided by Congress in accord with the 14th Amendment . States do not have to honor federal law, if they do not want to. And there is no federal consequence, unless by slim chance (1% or less) an appeal to the Supreme Court is accepted. Should fundamental rights depend upon such infinitesimal odds?

When states do not uphold the Constitution, as here and many other cases, there is no avenue of relief via lower federal courts because of the *Rooker-Feldman Doctrine* and also because of res judicata and collateral estoppel.

The Supremacy Clause states in part:
"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

But where is the stick to force the States to comply? This is a mandate to state courts and to this Court by the People. It, together with other parts of the Constitution, does not allow for the *Rooker-Feldman Doctrine*.

This Court has acknowledged that states may or may not incorporate "required procedural safeguards" into their law.

> *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 US, at 60." *City of Littleton, Col. v Z.J. Gifts,* at ___)

When state governments and judges chose not to "safeguard" federal rights, should they then be protected from federal lawsuits to enforce such "safeguards" by the *Rooker-Feldman Doctrine*, as here? Both lower courts and this Court have said YES. It is time to revisit this Doctrine.

E. The Court Should Resolve The Conflicts Between The Circuits.

The 6th Circuit has habitually applied the *Rooker-Feldman Doctrine* to bar federal civil rights cases, especially in *pro se* cases, where a state case was involved, as in this case. (See App C, p 10a, fn 3, - *Wabeke v Mulder*, No. 95-2099, 1996 WL 571302)

In *Elsman v Standard Federal Bank (a Michigan case)*, unpublished 00-2293/01-1544 (6th Cir 2002) the application of *Rooker-Feldman* by the District Court was affirmed on appeal. (Elsman had filed his federal suit to challenge the taking of his real and personal property and the state procedure that allowed such and failed - refused? - to protect his property rights. *Branzburg* stated: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government . ." *Id.* 689).

The district court held, according to the 6th Circuit, that:

> "Relying on the *Rooker/Feldman doctrine* (citations omitted) the court noted that it did not have jurisdiction to review the holdings of the Michigan courts and if an appeal were to be taken it should be to the United States Supreme Court. The court also held that the claims not fully litigated in the state court were barred by the doctrine of *res judicata*. In a *seeming contradiction*, however, the district court concluded that all of Elsman's arguments had been presented and ruled on in a previous lawsuit involving the same parties. The district court did not identify to which arguments it was referring." (emphasis added) *Id.* at 7-8.

On appeal Elsman argued against the *Rooker-Feldman doctrine*, but the 6th Circuit applied the *Rooker-Feldman doctrine* to determine the district court had no subject-matter jurisdiction over the real property claims. However, when it came to Elsman's personal property claims it stated they "present a more difficult question." Ultimately the 6th

Circuit held that "the district court . . . erroneously dismissed those claims based on *res judicata*." *Id.* at 19. Nevertheless, it did not reverse or remand on this issue, as justice would dictate. Instead it affirmed.

The 8th Circuit has broadly applied *Rooker-Feldman*. It has even allowed *sua sponte* "preservice dismissal" of *pro se* complaints. For example in *Thornblad v Anderson*, 104 Fed. Appx. 610 (2004 8th Cir) it states:

> "Joseph D. Thornblad appeals the district court's *preservice dismissal* of his 42 USC 1983 complaint as barred by Rooker-Feldman. * * * [W]e agree with the district court that the action was Rooker-Feldman barred because Thornblad's federal complaint raised constitutional challenges already decided by the Minnesota state courts." (emphasis added)

In contrast, the 11th Circuit has not followed that path. See *Wexler v Lepore*, 385 F.3d 1336, (2004, 11th Cir). In *Wexler*, an appeal was made and decided by the state court, but still the 11th Circuit did not apply *Rooker-Feldman*. See fn 5.

(Petitioner does not have the capability to research all the Rooker-Feldman cases.)

F. The Court Should Resolve The Conflict Between the Rooker - Feldman Doctrine And The Courts Own Statements.

In addition to the above conflicts, this Court has narrowed its *Rooker-Feldman Doctrine*, but it is not generally recognized by lower courts.

> "The Rooker-Feldman Doctrine interprets 28 USC 1257 as *ordinarily* barring direct review in the lower federal courts of *a decision reached by the highest state court*, for such authority is vested solely in this Court." (citation omitted) (emphasis added) *Asarco Inc. v Kadish*, 490 US 605, 622 (1989)

Asarco also endorsed prior precedents in apparent conflict with *Rooker-Feldman*. It cited "*Minnesota v National Tea Co.*, 309 US 551, 557 (1940)(this Court is responsible for

assuring "that *state courts will not be the final arbiters* of important issues under the federal constitution.")" (emphasis added) It went on to state:

"The predominent interest promoted by *this apparent exception* to normal preclusion doctrines is to assure that the binding application of federal law is uniform and ultimately subject to control by this Court. See *Richardson v Ramirez*, 418 US 24, 42, n. 13 (1974) (this Court may review a declaratory judgment granted by a state court, for "any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 USC 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court"). (emphasis added) *Id.* at 621-622.

Then this Court has said:

"`there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims.' *England v La. State Bd of Med. Examiners*, 375 US 411, 84 S Ct 461, 464, 11 L Ed 2d 440 (1964)." *Wexler v LePore*, 385 F.3d 1336 (2004)

"The possibility of appellate review by this Court of a state court determination *may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.* We made this clear only last Term in *NAACP v. Button, supra,* 371 U.S., at 427, when we said that "a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim." (emphasis

added) *England v Louisiana St. Brd Med. Exam.*, 375 US 411, 11 L Ed 2d 440, 84 S Ct 461 (1964)

This Court as recently as June of 2004 stated in *City of Littleton, Col. v Z.J. Gifts*, O2-1609 (June 7, 2004) that if a First Amendment adult book store *challenge to state or local law* is not quickly or properly heard in a state court that *a federal remedy under 42 USC 1983 is available in federal court.* But that is not true, when the *Rooker-Feldman Doctrine* defense is raised and applied as here and in hundreds of other cases.

Do citizens barred enforcement of their civil rights in state and federal court enjoy Equal Rights as required?

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one that precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of rights of citizens is a principle of republicanism. Every republican government is duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National government is limited to the enforcement of this guaranty." *US v Cruikshank*, 92 US 542, 23 L Ed 588, 592 (1876)

Furthermore, it appears that the *Rooker-Feldman Doctrine* has become a swift and sure method of clearing the federal docket, especially of *pro se* cases, and of protecting, undeservedly, the reputations of local officials and state judges.

3. ATTORNEY FEES IMPOSED AGAINST CITIZENS ATTEMPTING TO ENFORCE THEIR RIGHTS CHILLS THOSE RIGHTS AND IS RETALIATORY.

Do attorney fees awarded against citizens for petitioning for redress of grievances, as protected by the First Amendment, chill civil rights or amount to retaliation? This Court should decide the question.

One of the arguments Respondent Mulder offered in support of the permanent injunctions against Wabeke filing lawsuits was that Wabeke had not paid attorney fees awarded against him in past state lawsuits. See App C 9-10a, fn3; also Aff p 30 (Trans papers) In fact, subsequently, in both of the state permanent injunction cases, where Wabeke was enjoined by Respondent from filing future lawsuits against the City of Holland, attorney fees were imposed against him also, in favor of the City.

Petitioner believes that imposing attorney fees in favor of government against citizens seeking to protect their civil rights, or who are blowing the whistle on government misconduct, is oppressive and chills various rights including the First Am. "right to . . . petition for redress of greivances."

Citizens should not "fear" they will incurr large financial liabilities, with small chances of winning, to enforce their Constitutional rights.

Fear is a substantial motivator. In *Neitzke v Williams*, 490 US 319, 328, 104 L Ed 2d 338, 109 S Ct 1827 (1989) this Court stated:

> ". . . the *fear of financial sanctions doubtless deter* most inarguable paid claims, but such deterrence presumably screens out far less frequently those arguably meritorious legal theories whose ultimate failure is not apparent at the outset."

In *Business Guides v Chromatic Comm.*, 498 US 533, 570, (1991) four dissenting Justices said that there is a real possibility that "honest claimants [would] *fear to petition the courts.*" Thus it is clear that imposition of attorney fees creates that "fear" and impedes civil rights enforcement,

especially for those who, like Petitioner, are poor and unable to hire competent attorneys to present their cases.

There is evidence in this record, citing other cases, where substantial financial liabilities are imposed by permanent injunctions to suppress exercise of constitutional rights. (See App C 12a fn 3)

Petitioner, and many other civil rights plaintiffs, are poor or middle class, at best. See Petitioner's Affidavit p 30. Justice Douglas dissenting in *Clay v Sun Ins.* 263 US 207, 228 (1964) stated: "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two." This Court has decided that the poor cannot be deprived of appeal by leave to the highest court of a state because they cannot pay the filing fee. See *Burns v Ohio*, 360 US 252 (1959). See also *Pollock v Williams*, 322 US 4, 15 (1944). It is equally unconstitutional that they be forced to pay the government's attorney fees when they lose civil rights cases they bring *pro se*.

This is true despite the fact that some federal courts of appeals have held that imposition of attorney fees against civil rights plaintiffs must not be a routine practice.

In *Jones v Continental Corp*, 789 F2d 1225, 1232 (6th Cir) it was said: "An award of attorney's fees against a losing plaintiff in a civil rights action is an *extreme sanction*, and must be limited to truly egregious cases of misconduct." (emphasis added) There was no indication of any misconduct in the Wabeke state cases and certainly nothing "egregious."

But, despite federal law, apparently the Michigan courts are free to "take" attorney fees at will from citizens coming before it. Does the Constitution must offer any protection?

However, even federal court practice is inconsistent. Federal district courts have not only imposed attorney fees in civil rights cases, but also have enjoined suits until large bonds are posted by *pro se* plaintiffs in advance of suit sufficient to cover substantial amounts of attorney fees in order protect government defendants before filing any new

civil rights suit. See App C 12a fn 3; plus there are other cases.

This Court has held that the general public should be responsible for certain things benefiting the whole body of citizens.

> "The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "`designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra,* at 123-124 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. - *Palazzolo v Rhode Island,* 533 US 606, 633 (2001) (Justice O`Conner concurring)

Furthermore the line between frivolous and not frivolous is extremely vague and difficult to discern, even for judges. See *Neitzke v Williams,* 490 US 319, 329 (1989) ("not all unsuccessful claims are frivolous"). Sanctions were imposed on Petitioner because he was unsuccessful, with false assertions of being "frivolous." Attorneys and biased judges can claim a case is frivolous when it is not.

In the Wabeke state cases, neither judge made any findings that the case was frivolous, despite what is written in the order drafted by attorney Mulder.

The question should be addressed with the others.

4. THE COURT SHOULD DECIDE WHETHER THE INCLUDED CIVIL RIGHTS VIOLATIONS OF FRAUD ON THE COURT, CONSPIRACY AND RETALIATION MAY BE PURSUED REGARDLESS OF ROOKER-FELDMAN.

Respondent Mulder has claimed the qualified immunity defense, apparently contending either the right to

petition for redress of grievances or the right to not be permanently enjoined from filing lawsuits was not clearly established. Petitioner believes both have long been establised. Furthermore, other acts committed by Mr. Mulder, like fraud on the court and retaliation, have long been established.

Petitioner believes that the right to petitioning for redress of grievances was established at the time the Bill of Rights was adopted. If not then, it was at the time the 14th Amendment was adopted. Secondly, the right to not be permanently enjoined from petitioning was likewise established at the same time. Judges are confined to acting within the law.

Mr. Mulder recognized when he moved for the first injunction that First Amendment rights were involved. (See Trans) Therefore, he cannot contend that those rights were not established. Qualified immunity is a frivolous and false argument intending to evade liability.

A. Respondent Has Liability For False Statements

In addition, Petitioner has long argued and demonstrated Respondent Mulder, an attorney representing the City of Holland, made, and repeated in various courts, false and misleading statements to secure the permanent injunctions barring him from filing lawsuits in state courts. The District Court , at least, acknowledged that Wabeke disputed the facts. (See App C p 13a) However, Petitioner has found the courts are not about to listen to him.

Petitioner, depending upon this Court's decisions, does not believe the Respondent had any right to lie and/or mislead the state court in securing the permanent injunctions against him.

This Court has stated on numerous occassions that the goal of judicial proceedings is to find the truth. "Court proceedings are held for the solemn purpose of endeavoring to *ascertain the truth* which is the sine qua non of a fair trial." *Estes v Texas*, 381 US 532, 540, 14 L ed 2d 543, 85 S Ct 1628 (1965).(emphasis added)

In the unanimous decision *Lachance v Erickson*, 522 US 262 (1997) this Court said:

> "The core of due process is the right to notice and a meaningful opportunity to be heard" But we reject . . . the view . . . that a `meaningful opportunity to be heard' includes a right to make *false statements*." (emphasis added)

Respondent Mulder is an officer of the court. He has a supreme duty to be truthful about the law and facts. Failure to do so, Petitioner contends, imposes liability.

Petitioner believes that he was denied the right to show the fraud and deception in state and federal courts. An opposing party "must . . . be afforded a [full &] fair opportunity to show that . . . the stated reason . . . was in fact a *pretext* . ." *McDonnell Douglas Corp v Green*, 411 US 792, 804, 805, 36 L Ed 2d 668, 93 S Ct 1817 (1973).

It is evident from the District Court decision that Petitioner believed the information provided by Mulder was false and misleading. (See App C 13a)

This is an important question because others have been affected. The 6th Circuit has applied *Rooker-Feldman* to bar another *pro se* litigant a federal decision where, like here, *fraud* in the state case was a substantial issue. See *Metropolitian Life Ins. Co. v Brown*, (6th Cir. 2002, unpublished, 02-3318)

Petitioner believes that Mr. Mulder in the state cases commited fraud on the state courts to his injury. In *Hilton v Guyot*, 159 US 113 (1895) this Court held that both *fraud and prejudice* were sufficient reasons to undermine foreign judicial decisions. Therefore, Petitioner believes Respondent should have liability for his fraud also - in addition to other injuries acting under color of law.

Petitioner believes both fraud and prejudice are present in the state cases. The state judges are easily misled. They are judges like those described in the Declaration of Independence - owned by the king/state. Pro government. They have a bias for attorneys, government and against *pro se* litigants. It can be proven. (Judges are lawyers before

becoming judges. They are all members of the Bar. *Pro se* litigants are not allowed. Furthermore, judges receive "contributions" from lawyers for their elections.)

"When a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud, -- a fraud in fact, if he knows it to false; a fraud in law, if he does not know it to be true." *Davis v Wakelee*, 156 US 680, 689 (1895). By this definition Respondent Mulder commited fraud - he knew his claims were false.

B. Respondent has liability for retaliation.

In addition, Petitioner believes Mulder retaliated against him because Mulder had been the target of one or more of the previous Wabeke lawsuits. See App C at 10-11a, fn 2. And because he was at times the target of public criticism by Wabeke and had represented the City for years against Wabeke.

Retaliation for protected acts is clearly a civil rights violation. *Haddle v Garrison*, 525 US 121 (1998); *Rutan v Republican Party of Illinois*, 497 US 62, 75 at fn 8 (1990); *Board of Commissioner's Wabaunsee Co. v Umbehr*, 518 US ____, 135 L Ed 2d 843, 116 S Ct ____ (1996); *O'Hare Truck Service, Inc. v City of Northlake*, 518 US ____, 135 L Ed 2d 874, 116 S Ct ____ (1996); *Pickering v Board of Education*, 391 US 563, 571-572 (1968).

Fraud and retaliation must be allowed to proceed independent of *Rooker-Feldman*. Petitioner believes these acts separately and individually resulted in the violation of his civil rights and, therefore, that Respondent Mulder has liability. He would request that this Court find likewise.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition and address these important questions affecting his, and others, fundamental rights and provide relief.
Respectfully submitted,

_____ January ____, 2005

Paul Wabeke
PO Box 1132
Holland, Michigan 49423-1132

STATEMENTS ACCORDING TO 28 USC 1746

Based on knowledge, information and belief, I am a senior citizen who has been unjustly deprived of my property by the State. I survive on a meager social security check of less than $800 per month and have been a long time vocal critic of local (City of Holland) government officials, and their actions in relationship to their expenditure of public funds and other public acts, plus judges and lawyers.

My research, as a watchdog and whistleblower, has discovered many violations of law and rights - constitutional, state statutes, city charter, etc., and common law rights - by these officials and a lack of willingness on the part of superior state officials to even address these violations. Therefore, I have felt compelled to address them as best I can by means of lawsuits. In most cases I have paid the filing fees in my lawsuits and appeals. I paid, in 2003, all attorney fee sanctions accessed against me in all lawsuits to the City of Holland, even though I believe them to be unjust and oppressive - $4417.84.

Petitioner is convinced beyond doubt, due to his years of experiences and that of others he knows of who have had *pro se* experiences in Michigan courts, that *pro se* litigants cannot win in Michigan Courts no matter how good their case or defense. Petitioner has been involved in less than 20 lawsuits *pro se*, as defendant and plaintiff, and

has never won in over 15 years. It appears to me that the Michigan State Bar is the equivalent of a closed union shop and nonmembers are not allowed to win, no matter whether the law and constitution are both on their side. This is true regardless of Michigan Constitution Article 1, section 13, and 28 USC 1654, both supposedly protecting rights of *pro se* litigants. Of course the fact that all the judges are members of the same Bar does not help any, but smells of conflict of interest and lack of impartiality. In conclusion, I, and other *pro se* litigants, have found it impossible to enforce basic rights in Michigan state courts and consider them hostile to our rights.

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."
Executed on January ___ 2005.

_____

Paul Wabeke

APPENDIX A

03-2235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
June 17, 2004
LEONARD GREEN,
Clerk

PAUL E. WABEKE, Plaintiff-Appellant,

v.

ANDREW J. MULDER, Defendant-Appellee.

CALVIN L. BOSMAN, Judge and

HARRY BEACH, Judge, Defendants.

Before: KRUPANSKY and COLE, Circuit Judges; COOK, District Judge.*

NOT RECOMMENED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

Paul E. Wabeke, a Michigan resident proceeding pro se, appeals a district court order dismissing his civil action that sought an order to overturn injunctions issued against him by two state court judges in an

effort to deter Wabeke from filing frivolous lawsuits. Wabeke has filed a motion for judgment on the pleadings. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Wabeke filed this lawsuit on April 3, 2003, against an Ottawa County Circuit Court Judge (Calvin L. Bosman), an Allegan County Circuit Court Judge (Harry Beach), and a Holland, Michigan City Attorney (Andrew J. Mulder). Defendants Bosman and Beach issued injunctions against Wabeke. Attorney Mulder defended the City of Holland in two lawsuits in which the state courts found that injunctive relief against Wabeke was warranted.

On May 15, 2003, the district court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing Wabeke's claims against them with prejudice. Thereafter, on May 20, 2003, defendant Mulder filed a motion to dismiss, to which Wabeke responded. The district court granted the defendant's motion and dismissed the action pursuant to the provisions of Fed. R. Civ. P. 12(b)(1), concluding that the court lacked subject matter jurisdiction over the claims asserted in the complaint. Wabeke has filed a timely appeal.

We review de novo a district court's decision to dismiss an action for lack of subject matter jurisdiction. *Friends of Crystal River v. United States EPA*, 35 F.3d 1073, 1077-78 (6th Cir. 1994); *Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991). "Whenever it appears by suggestion of the parties or otherwise that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

Upon review, we conclude that the district court properly dismissed Wabeke's complaint for lack of subject matter jurisdiction. Because Wabeke's complaint merely reflected his dissatisfaction with the permanent injunction issued by the state court regarding his filing of further litigation and essentially sought federal court review of that state court order, the *Rooker-Feldman* doctrine precludes the exercise of federal jurisdiction. *See Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486 (1983); *Rooker v. Fid. Trust Co.,* 263 U.S. 413, 415-16 (1923). The *Rooker-Feldman* doctrine provides that federal district courts generally lack jurisdiction to review and determine the validity of state court judgments, even in the face of allegations that "the state court's action was unconstitutional." *Feldman,* 460 U.S. at 486; *see also Blanton v. United States,* 94 F.3d 227, 233-34 (6th Cir. 1996). Instead, review of final determinations in state judicial proceedings can be obtained only in the United States Supreme Court. 28 U.S.C. § 1257; *Feldman,* 460 U.S. at 476.

Accordingly, the district court's order is affirmed. The motion for judgment on the pleadings is denied. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX B

03-2235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 13, 2004
LEONARD GREEN,
Clerk

PAUL E. WABEKE, Plaintiff-Appellant,
v.
ANDREW J. MULDER, Defendant-Appellee.
CALVIN L. BOSMAN, Judge and
HARRY BEACH, Judge, Defendants.

Before: KRUPANSKY and COLE, Circuit Judges;
COOK, District Judge.*

Plaintiff-appellant has filed a motion to reconsider this court's order of June 16, 2004, affirming the district court's judgment that dismissed his civil rights action filed pursuant to 42 U.S.C. § 1983.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a).

The motion to reconsider is thus denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Plaintiff,

Case No. 1:03-cv-221

v. Honorable David W. McKeague

ANDREW J. MULDER, et al., Defendants.

ORDER OF DISMISSAL

In accordance with the accompanying opinion entered this date:

IT IS ORDERED that defendant's motion to dismiss plaintiff's claim (docket # 38) is GRANTED and plaintiff's complaint is hereby dismissed for lack of federal subject matter jurisdiction.

Dated: August 18, 2003

/s/ David W. McKeague
David W. McKeague
United States District Judge

CERTIFIED ECF DOCUMENT
I hereby attest and certify that this is a printed copy of a document which was electronically filed with the United States District Court for the Western District of Michigan on 8-18-03.

RONALD C. WESTON, SR CLERK OF COURT
By /s/M Jewell Deputy Clerk, dated 8-18 03.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Plaintiff,

Case No. 1:03-cv-221

v. Honorable David W. McKeague

ANDREW J. MULDER, et al., Defendants.

MEMORANDUM OPINION

This is a civil action brought by a *pro se* plaintiff. Plaintiff seeks an order from this court overturning injunctions issued against him by state court judges in an effort to deter plaintiff from filing frivolous lawsuits. Plaintiff named as defendants Ottawa County Circuit Court Judge Calvin Bosman; Allegan County Circuit Court Judge Harry Beach; and Holland, Michigan's City Attorney, Andrew J. Mulder. Defendants Bosman and Beach issued the injunctions. Attorney Mulder defended the City of Holland in the two lawsuits in which the state courts found that injunctive relief against plaintiff was warranted.

Plaintiff filed this lawsuit on April 3, 2003. On May 15, 2003, the court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing plaintiff's claims against them with prejudice. (docket # 33). [1] On May 20, 2003, defendant Mulder filed a motion to dismiss.

---

[1] Plaintiff did not proceed in forma pauperis, therefore, his complaint was not subject to initial screening.

(docket # 38). The court issued an order notifying plaintiff of his opportunity to respond to defendant's motion. (docket # 41). Plaintiff has filed his response (docket #'s 42, 44) and the matter is ready for decision. For the reasons set forth herein, defendant's motion to dismiss will be granted.

Applicable Standard

Federal courts are courts of limited jurisdiction which may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Therefore, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted). The first and fundamental question presented by every case brought to the federal district court is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "Quite aside from whether the parties raise jurisdictional issues themselves--or even attempt to consent or agree to federal jurisdiction--federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Douglas v. E.G. Baldwin Assoc., Inc.*, 150 F.3d 604, 606 (6th Cir. 1998).

Plaintiff has the burden of proving this court's subject matter jurisdiction. See *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6thCir. 2003); *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269

(6th Cir. 1990).

Defendant's motion seeks dismissal pursuant to Fed. R. Civ. P 12(b)(1). The Sixth Circuit recognizes two types of 12(b)(1) motions: a "facial" attack challenging the sufficiency of the plaintiffs factual allegations, in which all well-pleaded factual allegations in the complaint are taken as true; and a "factual" attack challenging the actual fact of subject-matter jurisdiction, which is analyzed under Fed. R. Civ. P. 56 standards. See *Nichols*, 318 F.3d at 677; *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.3d 320, 324 (6th Cir. 1990). The difference is often significant, because under a factual challenge the district court is empowered to weigh the evidence, and no presumptions apply as to the truthfulness of plaintiffs allegations. See *United States v. A.D. Roe Co.*, 186 F .3d 717, 721-22 (6th Cir. 1999). The Sixth Circuit has clearly recognized that a district court is empowered to consider evidence beyond the pleadings and to resolve factual disputes when necessary to resolve challenges to subject-matter jurisdiction under Rule 12(b)(1). See Nichols, 318 F.3d at 677, *Madison-Hughs v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996); *RMI Titanium Co. v. Westinghouse Elec. Co.*, 78 F.3d 1125, 1133-34 (6th Cir. 1996). Here, defendant makes a factual attack.

Facts

In 1997, plaintiff filed a lawsuit in Ottawa County Circuit Court against the City of Holland. Ottawa County Circuit Court Judge Calvin L. Bosman was the presiding judge. On October 13, 1997, Judge Bosman entered a "Judgment for Dismissal, Permanent Injunction and Award of Costs." See *Wabeke v. City of*

Holland, No. 97-28451-CZ (Ottawa County Circuit Court Oct. 13, 1997). (Complaint, Ex. 0). Judge Bosman dismissed plaintiff's complaint for failure to state a claim and assessed costs against plaintiff in the amount of $500. Judge Bosman issued the following injunction:

> [A] permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by Plaintiff against the Defendant, City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a circuit judge for the County of Ottawa for compliance with MCR 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically excepted from this permanent injunction is any cause of action by the plaintiff which cites a personal injury to the Plaintiff or to any of his property. (Complaint, Ex. 0).

Plaintiff sought review of Judge Bosman's decision in the Michigan Court of Appeals. See *Wabeke v. City of Holland*, No. 207260, 1999 WL 33453855 (Mich. Ct. App. Feb. 23, 1999). The Court of Appeals rejected plaintiff's claims that Judge Bosman had abused his discretion and exceeded his authority by entering the order dismissing the case and imposing sanctions. 1999 WL 33453855, at *1. The Michigan Court of Appeals found that plaintiff's history of abusive lawsuits warranted

the injunctive relief ordered by Judge Bosman.

> The trial court did not clearly err in determining that sanctions were warranted, and did not abuse its discretion by imposing costs in the amount of $500 and by enjoining the circuit court clerk from accepting any further pleadings from plaintiff without prior approval from a circuit court judge. The trial court found that plaintiff signed the instant complaint in violation of MCR 2.114(D). This suit was the 17th action filed by plaintiff[2] against defendant and other parties since 1979.

---

[2] Plaintiff's prolific litigation activities included multiple lawsuits in this court. See *Wabeke v. Maatman, et al.*, No. 1:91-cv-355 (W.D. Mich. May 30, 1991), aff'd, No. 91-1800, 1992 WL 58977, at * 1 (6th Cir. Mar. 26, 1992)(*res judicata* barred plaintiff's attempt to assert a cause of action arising out of ten state court lawsuits and seeking eleven million dollars in damages, declaratory relief, and a full-page written apology from defendants to be printed in the local newspaper), *cert. denied*, 506 U.S. 1072 (1993); *Wabeke v. Mulder*, No. 1:92-cv-200 (W.D. Mich. Apr. 22, 1994) (dismissing plaintiff's complaint for failure to state a claim); *Wabeke v. Mulder, et al.*, 4:95-cv-127 (W.D. Mich. Aug. 25, 1995) (granting defendants' motions to dismiss), aff'd, No. 95-2099, 1996 WL 571302 (6th Cir. Oct. 4, 1996) (affirming dismissal of plaintiff's claims that Judge Bosman and City Attorney Mulder had conspired to deprive plaintiff of due process of law in his state court suit against the City of Holland as barred by the *Rooker-Feldman* doctrine.

> All previous actions were dismissed. Sanctions were imposed in several cases; however, plaintiff did not pay as ordered. Plaintiff was afforded due process in connection with the imposition of sanctions. See *People v. Herrara* (On Remand), 204 Mich App 333, 339; 514 NW2d 543 (1994). Plaintiff's documented history of filing frivolous actions and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future. 1999 WL 33453855, at *1.

Plaintiff does not allege and has not shown that he sought leave to appeal this decision to the Michigan Supreme Court or that he petitioned the United States Supreme Court for a writ of certiorari seeking review of Judge Bosman's injunction.

The City of Holland is located within both Ottawa and Allegan Counties. In 2002, plaintiff filed another lawsuit against the City of Holland, this time in the Allegan County Circuit Court. On May 7, 2002, Allegan County Circuit Court Judge Harry A. Beach entered a "Judgment for Defendant for Summary Disposition, Permanent Injunction and Award of Costs." See *Wabeke v. City of Holland*, No. 02-31220-CZ (Allegan County Circuit Court May 7, 2002) (Complaint, Ex. P). Plaintiff does not allege that he sought appellate review of this decision in either Michigan's appellate courts or in the United States Supreme Court.

Plaintiff filed this lawsuit on April 3, 2003.

Discussion

As plaintiff is well aware, this court does not possess

direct oversight powers over state courts. It is patent that this court lacks jurisdiction to review the state-court decisions[3] plaintiff attempts to challenge in this lawsuit. See *District of Columbia Circuit Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995); see also *Warren v. Garn*, No. 02-1658, 2002 WL 31809068, at 1 (6th Cir. Dec. 12, 2002); *Kovats v. Hi-Lex Corp.*, No.02-1318, 2002 WL 31780951, at 2 (6th Cir. Dec. 11, 2002); *Metropolitan Life Ins. Co. v. Brown*, No.02-3318, 2002 WL 31012126, at *1 (6th Cir. Sept. 6, 2002).

---

[3] The right of access to courts is neither absolute or unconditional, and there is no right of access to the courts to prosecute an action that is frivolous and malicious. See *Tripati v. Beaman*, 878 F .2d 351, 353 (1Oth Cir. 1989). The injunctions imposed by the state courts are consistent with those issued by federal courts under similar circumstances. See, e.g., *Sassower v. American Bar Ass'n*, 33 F.3d 733, 736 (7th Cir. 1994) (court review and approval before acceptance of any proposed future filings by plaintiff); *United States ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 675 (7th Cir. 1995)(requiring plaintiff to pay all costs and attorney's fees imposed and to post a bond before allowing plaintiff to file another civil lawsuit against defendants); see also *Callihan v. Kentucky*, No. 01-6555, 2002, at * (6th Cir. June 12, 2002) (upholding injunction imposing prefiling restrictions); *Stewart v. Fleet Fin.*, No.99-2282, 2000 WL 1176881, at *2 (6th Cir. Aug. 10, 2000) (affirming this court's order requiring plaintiff to file a $25,000 cash bond and other restrictions in any future action against defendants.

"The *Rooker-Feldman* doctrine . . . holds that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims `inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). Plaintiff certainly disagrees with arguments Attorney Mulder made in state court and believes that Mulder mislead the state court judges. The Michigan Court of Appeals rejected plaintiff's arguments and found that the injunctive relief ordered by Judge Bosman was appropriate given plaintiff's history of litigation abuses. Plaintiff apparently elected not to seek state court appellate review of Judge Beach's decision. Plaintiff's claims against defendant Mulder are inextricably intertwined with the state court judgments. See *Pieper v. American Arbitration Ass 'n, Inc.*, No. 01-4043, __F.3d __, 2003 WL 21663246, at. *2 (6th Cir. July 11, 2003) ("When granting relief on the federal claim would imply that the state-court judgment on other issues was incorrect, federal courts do not have jurisdiction . . . ."); *see also Baker v. Michigan Family Independence Agency*, No. 03-1022, 2003 WL 21674747, at *1 (6th Cir. July 16, 2003); *Riser v. Franklin County Court of Common Pleas*, No. 02-4309, 2003 WL 21774011, at *1 (6th Cir. July 30, 2003) (district court properly found plaintiff's claims barred by the *Rooker-Feldman* doctrine because he sought to relitigate his prior state court actions, even though his intent to do so was veiled by nominal allegations of constitutional violations); *Akers v. Bishop*, No. 02-6235, 2003 WL 21019171, at *2 (6th Cir. May 2, 2003).

Conclusion

For the reasons set forth herein, defendant's motion will be granted and plaintiff's Complaint dismissed for lack of subject matter jurisdiction.

Dated: August 18, 2003

/s/David W. Mc Keague
David W. Mc Keague
United States District Judge

[stamped] Original Filed Electronically
Ronald C. Weston, Sr.,Clerk

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479.3011

November 3, 2004

Mr. Paul Wabeke
P.O. Box 1132
Holland, MI 49423-1132

Re: Paul E. Wabeke v. Andrew J. Mulder, et al.
Application No. 04A373

Dear Mr. Wabeke:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 3, 2004 extended the time to and including January 10, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
/s/ Ann McCamey
By Ann McCamey
Case Analyst

FEB 17 2005

No. 04-953

In The
Supreme Court of the United States

PAUL E. WABEKE,

Petitioner,

v.

ANDREW J. MULDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

RONALD J. VANDER VEEN
(P33067)
CUNNINGHAM DALMAN, P.C.
Attorneys for Respondent Andrew J. Mulder
321 Settlers Road
P.O. Box 1767
Holland, MI 49422-1767
(616) 392-1821

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN LACKED JURISDICTION UNDER THE *ROOKER-FELDMAN* DOCTRINE TO REVIEW A STATE COURT'S ORDER IMPOSING SANCTIONS ON A LITIGANT AFTER HE HAD FILED NUMEROUS FRIVOLOUS LAWSUITS AGAINST MANY OF THE SAME PARTIES?

II. WHETHER THIS COURT SHOULD REVERSE THE LONG-STANDING *ROOKER-FELDMAN* DOCTRINE WHICH HAS BEEN UNIFORMLY APPLIED TO DENY THE UNITED STATES DISTRICT COURT'S JURISDICTION TO REVIEW STATE COURT DECISIONS?

III. WHETHER THE PETITIONER'S COMPLAINT REGARDING THE STATE COURT IMPOSING SANCTIONS AGAINST HIM IS "INEXTRICABLY INTERTWINED" WITH THE STATE COURT DETERMINATION SO THAT ANY FEDERAL CLAIMS COULD ONLY SUCCEED TO THE EXTENT THE STATE COURT WRONGLY DECIDED THE ISSUES BEFORE IT?

IV. WHETHER A FEDERAL COURT (WHICH DOES NOT HAVE JURISDICTION OVER A MATTER AND WHEN QUALIFIED IMMUNITY APPLIES) CAN IMPOSE LIABILITY ON AN ATTORNEY FOR ARGUMENTS MADE IN STATE COURT?

PARTIES TO THE PROCEEDINGS

PETITIONER

Petitioner is a resident of the City of Holland. Since 1979, he has filed at least 19 lawsuits against the City of Holland, its officials, and others (including Respondent Andrew J. Mulder, the City Attorney for the City of Holland). Petitioner has not prevailed in any of these lawsuits and has been sanctioned for filing frivolous lawsuits.

RESPONDENT

Respondent is an attorney licensed to practice in Michigan and has been appointed as the City Attorney or Deputy City Attorney for the City of Holland for over 29 years.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	9
I. STANDARD FOR GRANTING REVIEW OF PETITION FOR CERTIORARI	9
II. THERE IS NO CONFLICT IN THE CIRCUITS AND THIS COURT HAS NOT APPLIED THE *ROOKER-FELDMAN* DOCTRINE IN A CONTRADICTORY MANNER	10
A. THE *ROOKER-FELDMAN* DOCTRINE HAS BEEN AN IMPORTANT ELEMENT OF FEDERAL JURISPRUDENCE SINCE 1923	10
B. THIS COURT HAS NOT APPLIED THE *ROOKER-FELDMAN* DOCTRINE IN A CONTRADICTORY MANNER	14
C. THERE IS NO CONFLICT IN THE CIRCUITS IN APPLYING THE *ROOKER-FELDMAN* DOCTRINE	15

TABLE OF CONTENTS – Continued

Page

III. THE WESTERN DISTRICT OF MICHIGAN AND THE SIXTH CIRCUIT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER 18

A. THE *ROOKER-FELDMAN* DOCTRINE DOES NOT VIOLATE THE SUPREMACY CLAUSE 18

B. THE *ROOKER-FELDMAN* DOCTRINE DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE 21

C. THE *ROOKER-FELDMAN* DOCTRINE DOES NOT VIOLATE THE FIRST AMENDMENT 22

IV. EVEN IF THE *ROOKER-FELDMAN* DOCTRINE DOES NOT APPLY, THERE WAS HARMLESS ERROR IN THE LOWER COURT'S DECISIONS BECAUSE FEDERAL COURTS HAVE CONSISTENTLY HELD (AND IN A WAY THAT DOES NOT CONFLICT WITH THIS COURT'S OPINION) THAT THE RIGHT OF ACCESS TO THE JUDICIAL SYSTEM IS NOT ABSOLUTE AND MAY BE SUBJECT TO REASONABLE SAFEGUARDS INCLUDING THE AUTHORITY TO AWARD SANCTIONS AND TO REQUIRE THAT THERE BE MERIT AND LAW IN FACT TO PURSUE A LAWSUIT 23

TABLE OF CONTENTS – Continued

Page

V. EVEN IF THE *ROOKER-FELDMAN* DOCTRINE ~~DOES NOT APPLY~~, THERE WAS HARMLESS ERROR IN THE LOWER COURT'S DECISIONS BECAUSE RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY AS CITY ATTORNEY FOR THE CITY OF HOLLAND 26

VI. PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS AND THIS COURT SHOULD AWARD COSTS TO THE RESPONDENT 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) 13

Asarco, Inc. v. Kadish, 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989) 14

Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970) 13

Bender v. Williamsport Area School District, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986) 11

Brandenburg v. Beaman, 632 F.2d 120 (10th Cir. 1980) 28

Brown v. District Unemployment Compensation Board, 411 F. Supp. 1001 (D.C. 1975) 29

Callihan v. Kentucky, No. 01-6555 (6th Cir. June 12, 2002) 24

Carter v. United States, 733 F.2d 735 (10th Cir. 1984), cert. denied, 469 U.S. 1161, 105 S. Ct. 915, 83 L. Ed. 2d 928 (1985) 24

Catz v. Chalker, 142 F.3d 279 (6th Cir. 1998) 11, 12

Claflin v. Houseman, 93 U.S. 130, 23 L. Ed. 833 (1876) 18

Cullinan v. Abramson, 128 F.3d 301 (6th Cir. 1997), cert. denied, 523 U.S. 1094, 140 L. Ed. 2d 792, 118 S. Ct. 1560 (1998) 26

District of Columbia Court of Appeals, et al. v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dominque v. Telb, 831 F.2d 673 (6th Cir. 1987) 27

Douglas v. E. G. Baldwin Association, Inc., 150 F.3d 604 (6th Cir. 1998) 11

Douglas v. New York, N. H. & H. R. Co., 279 U.S. 377, 49 S. Ct. 355, 73 L. Ed. 747 (1929) 19

E.G. Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981) 13

Ellman v. Standard Federal Bank, 46 Fed. Appx. 792 (6th Cir. 2002) 15, 16

England v. Louisiana State Board of Medical Examiners, 373 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) 17

Fields v. County of Lapeer, 2000 U.S. App. LEXIS 29182 (6th Cir. 2000) 28

Graham v. Riddle, 554 F.2d 133 (4th Cir. 1977) 24

Hardwick v. Brinson, 523 F.2d 798 (5th Cir. 1975) 24

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 27

Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) 18, 19, 20

In re Green, 669 F.2d 779 (D.C. Cir. 1981) 23, 24

In re MacDonald, 489 U.S. 180, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989) 23

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) 11

Kotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986) 24

TABLE OF AUTHORITIES – Continued

Page

Martin v. Hunter-Lessee, 14 U.S. 304, 4 L. Ed. 97 (1816) 21

Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916) 18

Minnesota v. National Tea, 309 U.S. 551, 60 S. Ct. 676, 84 L. Ed. 920 (1940) 14

Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912) 19

People v. Herrara, 204 Mich. App. 333, 514 N.W.2d 543 (1994) 5

Phillips v. Karey, 638 F.2d 207 (10th Cir.), cert. denied, 450 U.S. 985, 101 S. Ct. 1524, 67 L. Ed. 2d 821 (1981) 23

Richardson v. McKnight, 521 U.S. 399, 138 L. Ed. 2d 540, 117 S. Ct. 2100 (1997) 26

Rooker, et al. v. Fidelity Trust Co., et al., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) ..... *passim*

Sassower v. American Bar Association, 33 F.3d 733 (7th Cir. 1994) 24

Stewart v. Fleet Financial, 2000 WL 1176881 (6th Cir. August 10, 2000) 24

Swain v. Pressley, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977) 13

Tate v. Burke, 131 F.R.D. 363 (D.C. Cir. 1990) 28

Thornblad v. Anderson, 104 Fed. Appx. 610 (8th Cir. 2004) 16

United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947) 21

TABLE OF AUTHORITIES – Continued

Page

United States Ex Rel. Verdone v. Circuit Court for Taylor County, 73 F.3d 669 (7th Cir. 1995) 24

Wabake v. Maatman, et al., No. 1:91-cv-355 (W.D. Mich. May 30, 1991), aff'd, 1992 WL 58977 2

Wabeke v. City of Holland, 1999 WL 33453855 (1999) 4, 17

Wabeke v. Mulder, No. 1:92-cv-200 (W.D. Mich. April 22, 1994) 2

Wabeke v. Andrew Mulder, et al., Case No. 03-2235 12

Wabeke v. Mulder, et al., 4:95-cv-127 (W.D. Mich. Aug. 25, 1995); (aff'd, 1996 WL 571302 (6th Cir. 1996) 2

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993) 27

Wexler v. Lepore, 385 F.3d 1336 (11th Cir. 2004) 16

STATUTES

28 U.S.C. § 1254 ..... 1, 15

RULES

M.C.R. 2.114 28

M.C.R. 2.114(D) 3, 4, 5

M.C.R. 2.114(E) 3

M.C.R. 7.203 6

M.C.R. 7.301 ..... 5, 6

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

J. Moore, *Federal Practice*, Para. 0 60 [6] (2d ed. 1975) 29

Wechsler, *The Appellate Jurisdiction of the Supreme Courts; Reflections on the Law and Logistics of Direct Review*, 34 Wash. & L. Rev. 1043, 1047 (1977) 20

OPINIONS BELOW

Respondent agrees with the statement of the opinions below by the Petitioner.

STATEMENT OF JURISDICTION

Petitioner claims that this Court should exercise jurisdiction in this case under 28 U.S.C. § 1254 which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after a rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification, the Supreme Court may give binding instructions or require the entire record to be sent up for a decision of the entire matter in controversy."

As discussed more completely in the Argument section, the *Rooker-Feldman* doctrine provides that federal district courts do not have jurisdiction to engage in appellate review of state court determinations. Petitioner raised his underlying legal issues with the Michigan Court of Appeals on appeal from the Ottawa County Circuit Court. The Michigan Court of Appeals decided these issues. Petitioner now attempts to have a federal district court review the Michigan Court of Appeals' decision in an appellate capacity. The *Rooker-Feldman* doctrine precludes a federal district court from exercising jurisdiction in this capacity. As a result, this Court should not grant Petitioner's Petition for Writ of Certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent merely refers to statutes and constitutional provisions that are already provided in full text in Petitioner's Petition for Writ of Certiorari. As a result, no additional statutes and constitutional provisions have been provided.

STATEMENT OF THE CASE

Since 1979, Petitioner has filed at least 19 lawsuits against the City of Holland, its officials, and others (including Respondent Andrew J. Mulder, the City Attorney for the City of Holland).[1] This petition for certiorari stems from Petitioner's federal lawsuit that sought to overturn injunctions that were entered in the Ottawa County and Allegan County Circuit Courts in Michigan.

---

[1] The Honorable David W. McKeague noted Petitioner's "prolific litigation activities" in the lower court's opinion. Judge McKeague quoted a state court of appeals opinion indicating that Petitioner filed 17 suits as of 1999. Judge McKeague also stated as follows:

> "Plaintiff's prolific litigation activities included multiple lawsuits in this court. See *Wabake v. Maatman, et al.*, No. 1:91-cv-355 (W.D. Mich. May 30, 1991), aff'd, No. 91-1800, 1992 WL 58977 at *1 (6th Cir. Mar. 26, 1992) (*Res Judicata* barred Plaintiff's attempt to assert a cause of action arising out of ten state court lawsuits and seeking $11,000,000 in damages, declaratory relief, and a full-page written apology from Defendants to be printed in the local newspaper, (*cert. denied*, 506 U.S. 1072 [1993]); *Wabeke v. Mulder*, No. 1:92-cv-200 (W.D. Mich. Apr. 22, 1994) (dismissing plaintiff's complaint for failure to state a claim); *Wabeke v. Mulder, et al.*, 4:95-cv-127 (W.D. Mich. Aug. 25, 1995); granting defendants motion to dismiss (aff'd, No. 95-2099, 1996 WL 571302 [6th Cir. Oct. 4, 1996]); affirming dismissal of plaintiff's claims that Judge Bosman and City Attorney Mulder have conspired to deprive Plaintiff of due process of law in his state court suit against the City of Holland as barred by the *Rooker-Feldman* doctrine."

See Western District of Michigan's August 18, 2003 opinion and Respondent's Appendix at App. 16.

On July 8, 1997, Petitioner filed a lawsuit against the City of Holland in Michigan's Ottawa County Circuit Court relating to the expenditure of public monies on property owned by the City of Holland called "Windmill Island." The Ottawa County Circuit Court dismissed Petitioner's complaint and entered an order limiting his ability to file future litigation unless the complaint complied with M.C.R. 2.114(D) relating to the mandatory certification of law and fact before a lawsuit is filed in Michigan.[2] The order of the Honorable Calvin L. Bosman provides:

> "A permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by Plaintiff against Defendant City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a Circuit Judge for the County of Ottawa for compliance with M.C.R. 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. ***Specifically exempted from this permanent injunction is any cause of action by the Plaintiff which cites a personal injury to the Plaintiff or to any of his property.***" (Emphasis added.)

See p. 2 of Judge Bosman's October 13, 1997 judgment and Respondent's Appendix at App. 10-11.

Contrary to Petitioner's claims, this injunction does not prohibit him from filing any lawsuits against the City of Holland or its officials or agents. Instead, it merely

---

[2] M.C.R. 2.114(D) requires that the party filing a pleading in state court sign it verifying that it is well grounded in fact, warranted by law, and it is not for an improper purpose. See Respondent's Appendix at App. 37-38. M.C.R. 2.114(E) provides that the state court may impose any sanctions that it deems appropriate for a violation of M.C.R. 2.114(D) other than punitive damages.

requires that the complaint be merited in fact and law and not be for an improper purpose as required by M.C.R. 2.114(D). The injunctive order merely requires Petitioner to comply with the same standard imposed on all litigants in Michigan. Further, the order imposes no limitations on the Petitioner's ability to file suit against the City or any of its officials for personal injury or property damage.

Petitioner sought review of the Ottawa County Circuit Court decision in the Michigan Court of Appeals. Petitioner raised his constitutional issues with the Ottawa County injunctive order. In question #2 of his brief on appeal, he stated:

> "Since the XIVth Amendment to the U.S. Constitution guarantees the citizens the right to have due process of law, was it proper and legal for a permanent injunction to be placed against the Plaintiff/Appellant, which would preclude the Ottawa County Clerk to file any litigation without a complaint first being first reviewed by a Circuit Judge?"

See Appellant's brief, and Respondent's Appendix at App. 5. In an unpublished opinion, the Michigan Court of Appeals affirmed the Ottawa County Circuit Court's decision and stated:

> "The trial court did not clearly err in determining that sanctions were warranted, and did not abuse its discretion by imposing costs in the amount of $500.00 and by enjoining the Circuit Court Clerk from accepting any further pleadings from Plaintiff without prior approval from a Circuit Court Judge. The trial court found that Plaintiff signed the instant complaint in violation of M.C.R. 2.114(D). The suit was the 17th action filed by Plaintiff against Defendant and other parties since 1979. All previous actions were dismissed. Sanctions were imposed in several cases; however, Plaintiff did not pay as ordered."

See *Wabeke v. City of Holland*, 1999 WL 33453855 (1999) and Respondent's Appendix at App. 30. Equally as important, the Michigan Court of Appeals held that the Petitioner

was afforded due process in connection with the imposition of sanctions in its holding that: "Plaintiff was afforded due process in connection with the imposition of sanctions. See *People v. Herrara* (on remand), 204 Mich. App. 333, 339; 514 N.W.2d 543 (1994)." See *Id.* at App. 30. The Court concluded by finding that: "Plaintiff's documented history of filing frivolous actions and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future."

Under M.C.R. 7.301, Petitioner had a right to apply for leave to appeal with the Michigan Supreme Court. However, Petitioner failed to avail himself of this opportunity. If he had done so, Petitioner could have subsequently appealed to this Court for a determination on these issues. Rather than following this process, Petitioner admits that:

> "because the City of Holland covers parts of two counties (Ottawa and Allegan), Mr. Wabeke was able to file a subsequent lawsuit against the City of Holland in Allegan County over the new issue and ***evade*** the Ottawa Co. permanent injunction." (Emphasis added.)

See p. 6 of Petitioner's Petition for Writ of Certiorari.

On March 25, 2002, Petitioner filed another lawsuit (this time in Allegan County) against the City of Holland and its officials challenging expenditures to redevelop a large public park abutting Lake Macatawa commonly known as "Kollen Park." The Honorable Harry A. Beach of the Allegan County Circuit Court dismissed the action, determined it was frivolous, and granted an injunction on the same terms as the Ottawa County Circuit Court. It provides:

> "That a permanent injunction is hereby issued precluding the Allegan County Clerk from accepting any litigation filed by the Plaintiff against the Defendant City of Holland, any of its officials or any of its agents who have acted in the capacity as agents or officials for the City of Holland until the Complaint of the Plaintiff has been reviewed by the presiding Judge for the County of Allegan for compliance with M.C.R.

> 2.114(D) and upon receipt or evidence of a receipt to the Allegan County Clerk evidencing payment of all costs in any proceedings previously imposed against the Plaintiff and in favor of the Defendant. ***Specifically exempted from this permanent injunction is any cause of action by the Plaintiff which cites a personal injury arising from the tortuous conduct of the Defendant, its officials or agents, which results in personal injury to the Plaintiff himself or any of his property.***" (Emphasis added.)

See Judge Beach's May 17, 2002 judgment and Respondent's Appendix at App. 40.

The Allegan County Circuit Court also assessed costs of $500.00 against the Petitioner.

Petitioner had a right to appeal this judgment to the Michigan Court of Appeals. M.C.R. 7.203. He also had a right to request leave to appeal from the Michigan Supreme Court. M.C.R. 7.301. Likewise, he could have availed himself of petitioning this Court to hear these issues on a writ of certiorari. Notwithstanding, Petitioner did not avail himself of any of these opportunities.

Instead, Petitioner filed another lawsuit in the Western District of Michigan Federal Court on April 3, 2003.[3]

---

[3] This is not the first time that Petitioner has engaged in "forum shopping." Petitioner filed a lawsuit against the City of Holland in Ottawa County Circuit Court, Circuit Court No. 91-15029-CZ. The Honorable Calvin L. Bosman ordered that Petitioner post a bond and security for costs he had not paid. Petitioner appealed and subsequently filed suit in the Federal Court for the Western District of Michigan against the Respondent claiming a violation of his due process rights. The Honorable Benjamin F. Gibson dismissed the lawsuit based on the *Younger* doctrine. Later, Judge Bosman dismissed the suit in Ottawa County Circuit Court because Petitioner failed to past the required bond. Petitioner again filed suit in the Western District of Michigan claiming that now Judge Bosman and Respondent conspired to deprive him of his constitutional rights. The Honorable Douglas N. Hillman dismissed the case. See August 25, 1994 opinion and Respondent's Appendix at App. 20-27. The Sixth Circuit affirmed the lower court on the basis that the *Rooker-Feldman* doctrine prevented the district court

(Continued on following page)

This complaint was filed against City Attorney Andrew J. Mulder and Judges Calvin L. Bosman, and Harry A. Beach. On May 15, 2003, the Judges for Ottawa and Allegan County filed a motion to dismiss and the Honorable David W. McKeague granted the motion.[4]

On May 20, 2003, Respondent filed a motion to dismiss and the Honorable David W. McKeague likewise granted the motion. See Honorable David W. McKeague's Memorandum Opinion dated August 16, 2003, and Respondent's Appendix at App. 12-19. In reaching this decision, Judge McKeague reasoned that the federal courts have limited jurisdiction and that the burden rests on the party seeking to establish jurisdiction. In doing so, he applied the *Rooker-Feldman* doctrine in holding that the court lacks jurisdiction to review state court's decisions that are "inextricably intertwined."

After the present case was dismissed, Petitioner filed an appeal with the Sixth Circuit. The Sixth Circuit affirmed the Honorable David W. McKeague's decision holding that it did not have jurisdiction based upon the *Rooker-Feldman* doctrine. See opinion of Sixth Circuit dated June 17, 2004, and Respondent's Appendix at App. 31-33.

Subsequently, Petitioner filed a petition for writ of certiorari with this Court. He claims that the *Rooker-Feldman* doctrine violates the First Amendment, the separation of powers doctrine, and the supremacy clause.[5]

---

from exercising appellate jurisdiction and reviewing the Michigan Court judgments. See October 4, 1996 order and Respondent's Appendix at App. 34-36.

[4] Ironically, Petitioner even agreed to this dismissal before it was entered by sending a letter to the court.

[5] It is also ironic that Petitioner believes that his First Amendment rights have been violated. He even admits in his petition that he has been "critical in official town meetings." See p. 14 of Petitioner's Petition for Writ of Certiorari. In addition, the City of Holland has never prohibited him from speaking at these meetings. Also, he ran for Mayor of the City of Holland in 2004, and was not elected.

This is a straight-forward jurisdictional issue. The *Rooker-Feldman* doctrine is a long-standing and important element of federal jurisprudence. Petitioner is attempting to evade this jurisdictional doctrine as he did previously with filing in the Allegan County Circuit Court.[6]

---

[6] In his petition, Petitioner claims that the Michigan Courts are predisposed to decide against him and other pro se litigants. However, he fails to acknowledge that numerous judges (both state and federal) have decided against him, including:

- Honorable Calvin L. Bosman, most recently in the October 13, 1997 judgment;
- Honorable Harry A. Beach, most recently in the May 17, 2002 judgment;
- Honorable David W. McKeague, most recently in the August 18, 2003 opinion;
- McDonald;
- Honorable Karen Fort Hood, most recently in the decision affirming the Ottawa County Circuit Court's injunction;
- Honorable Martin M. Doctoroff, most recently in the decision affirming the Ottawa County Circuit Court's injunction;
- Honorable Donald S. Owens, most recently affirming the Ingham County Circuit Court's dismissal of Petitioner's mandamus action against 58th District Judges;
- Honorable William B. Murphy, most recently affirming the Ingham County Circuit Court's dismissal of Petitioner's mandamus action against 58th District Judges;
- Honorable Helen N. White, most recently affirming the Ingham County Circuit Court's dismissal of Petitioner's mandamus action against 58th District Judges;
- Honorable Benjamin F. Gibson, dismissing Petitioner's $11,000,000 lawsuit;
- Honorable Douglas N. Hillman, granting summary judgment to Petitioner's complaint;
- Honorable Cornelia C. Kennedy, in 1996 affirming the Western District of Michigan's decision denying jurisdiction;

(Continued on following page)

ARGUMENT

I. STANDARD FOR GRANTING REVIEW OF PETITION FOR CERTIORARI.

Rule 10 of this Court's rules provides the standards governing the review on certiorari. It provides:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for ***compelling reasons***. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character or reasons the Court considers:
>
> (a) A United States Court of Appeals has entered ***a decision in conflict with the decision of another United States Court of Appeals*** on the same important matter; has decided an important federal question in a way that ***conflicts with the decision by a state court of last resort***; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) A state court of last resort has decided an important federal question in a way that

---

- Honorable Martha Craig Daughtery, in 1996 affirming the Western District of Michigan's decision denying jurisdiction;
- Honorable Joseph H. Weis, Jr., in 1996 affirming the Western District of Michigan's decision denying jurisdiction;
- Honorable Robert Krupansky, most recently affirming the Western District of Michigan's decision denying jurisdiction;
- Honorable R. Guy Cole, Jr., most recently affirming the Western District of Michigan's decision denying jurisdiction;
- Honorable Julian A. Cook, Jr., most recently affirming the Western District of Michigan's decision denying jurisdiction.

conflicts with the decision of another state court of last resort or of the United States Court of Appeals;

(c) A state court or a United States Court of Appeals has decided an important ***question of federal law that has not been, but should be, settled by this Court***, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Emphasis added.)

The Petitioner apparently seeks certiorari under Rule 10(a) and (c). He erroneously claims that there is a conflict in the circuits (regarding the long-established *Rooker-Feldman* doctrine) and that this Court's decisions are conflicting. The Petitioner is wrong on both accounts. Also, Petitioner is requesting that this Court overturn a doctrine that has been established and followed consistently since 1923. The egregious facts in this case support the sound wisdom and policy of the *Rooker-Feldman* doctrine.[7]

II. THERE IS NO CONFLICT IN THE CIRCUITS AND THIS COURT HAS NOT APPLIED THE *ROOKER-FELDMAN* DOCTRINE IN A CONTRADICTORY MANNER.

A. The *Rooker-Feldman* doctrine has been an important element of federal jurisprudence since 1923.

Petitioner has inappropriately framed the issue on appeal as a substantive one (i.e., a violation of the First

[7] Petitioner also raises issues related to access to the courts. It is not necessary for this Court to review these issues because jurisdiction is not proper. However, Respondent has also addressed these issues in the event there is any merit to Petitioner's jurisdictional arguments.

Amendment, the supremacy clause, etc.) as opposed to what is clearly one of jurisdiction. The Honorable David W. McKeague, District Judge of the Western District of Michigan and the Sixth Circuit, properly addressed this issue. Judge McKeague stated:

> "Federal courts are courts of limited jurisdiction which may exercise only those powers authorized by Constitution and statute." *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Therefore, "[i]t is to be presumed that a cause lies outside the limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting the jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted). "The first and fundamental question presented by every case brought to the Federal District Court is whether it has jurisdiction to hear a case, even when the parties concede or do not raise or address the issue." See *Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986). "Quite aside from whether the parties raised jurisdictional issues themselves – or even attempt to consent or agree to federal jurisdiction – federal courts have an independent obligation to investigate and police the boundaries of their jurisdiction. *Douglas v. E. G. Baldwin Association, Inc.*, 150 F.3d 604, 606 (6th Cir. 1998)."

Both the District Court for the Western District of Michigan and the Sixth Circuit held that the *Rooker-Feldman* doctrine precluded jurisdiction in this case.[8] The Sixth Circuit stated:

---

[8] The Sixth Circuit has developed a two-step inquiry for determining whether the *Rooker-Feldman* doctrine applies. *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998). The first step examines whether the federal claim is "inextricably intertwined" with the claim asserted in the prior state court proceeding. *Id.* The Sixth Circuit stated that:

(Continued on following page)

> "Because Wabeke's complaint merely reflected his dissatisfaction with the permanent injunction issued by the state court regarding his filing a further litigation and essentially sought federal court review of the state court order, the *Rooker-Feldman* doctrine precludes the exercise of federal jurisdiction."

Wabeke v. Andrew Mulder, et al., Case No. 03-2235.

Petitioner attempts to undermine the application of the *Rooker-Feldman* doctrine as it has existed since 1923. As a result, it is important to review these fundamental cases. In *Rooker, et al. v. Fidelity Trust Co., et al.*, a lawsuit was filed in the Circuit Court of Indiana and was ultimately affirmed by the Indiana Supreme Court. 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923). Subsequently, a lawsuit filed in federal district court alleging violations of the contract clause, due process, and equal protection. On appeal before this Court, this Court analyzed whether the federal district court had jurisdiction over the matter. The Court reasoned that the federal district courts only have strictly original jurisdiction. Reviewing the Indiana State Supreme Court's decision would clearly amount to an "exercise of appellate jurisdiction." As a result, the federal district court did not have jurisdiction over the case.

This jurisdictional issue was also addressed in *District of Columbia Court of Appeals, et al. v. Feldman*, 460 U.S.

> "Under the [*Rooker-*]*Feldman* doctrine, the federal claim is inextricably intertwined with the state-court judgment if the federal claims succeed only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment."

Catz v. Chalker, 142 F.3d 279 (6th Cir. 1998) quoting *Keene Corp. v. Cass*, 908 F.2d 293 at 296-297 (8th Cir. 1990). The second part to determine if the claim is a general challenge to the constitutionality of a state law or is merely based on an inappropriate application of the state law. See *Id.*

462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). In this case, two applicants that applied to the bar for the District of Columbia were denied sitting for the bar examination. This was a decision of the District of Columbia State Court of Appeals. Subsequently, the applicants brought lawsuits in federal district court claiming that the denial was unconstitutional. After initially determining that the proceedings were judicial in nature, this Court analyzed whether the federal district court had jurisdiction over the matter. The Court ruled that the district courts did not have jurisdiction over the complaints. In footnote 16, the Court stated:

> "As we noted in *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970), lower federal courts possess no power whatsoever to sit in direct review of state court decisions." *Id.* at 296, 90 S. Ct. at 1748. "If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the State Court's decision. This the District Court may not do. Moreover, the fact that we may not have jurisdiction to review a final state court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court, a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is immanently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. See *E.G. Sumner v. Mata*, 449 U.S. 539, 549, 101 S. Ct. 764, 770, 66 L. Ed. 2d 722 (1981); *Allen v. McCurry*, 449 U.S. 90, 105, 101 S. Ct. 411, 420, 66 L. Ed. 2d 308 (1980); *Swain v. Pressley*, 430 U.S. 372, 383, 97 S. Ct. 1224, 1230, 51 L. Ed. 2d

> 411 (1977). We also noted in *Cardinal* that one of the policies underlying the requirement that constitutional claims be raised in State Court as a prerequisite to our certiorari jurisdiction is a desirability of giving the State Court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction or response to those arguments."

Id. at 439.

B. This Court has not applied the *Rooker-Feldman* doctrine in a contradictory manner.

In an attempt to create conflict in this Court's opinions, Petitioner has misconstrued this Court's opinions. He cites to *Asarco, Inc. v. Kadish*, asserting this as a case in which this Court somehow inconsistently applied the *Rooker-Feldman* doctrine. 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989). In this case, taxpayers filed a lawsuit challenging a statute that permitted the State Land Department to lease minerals and school and trust lands at a flat royalty rate. The lawsuit was filed in Arizona State Court. Ultimately, the Arizona State Court ruled that the statute was unconstitutional. Some mineral lessee filed a petition for certiorari with this Court. This Court addressed whether jurisdiction was proper. In doing so, it analyzed whether the judgment was final, the parties had standing, and whether there was an adequate and independent state grounds for the decision. The *Rooker-Feldman* doctrine was discussed in the context of whether the plaintiffs had standing. In doing so, it cited to *Minnesota v. National Tea*, which stated that:

> "This Court is responsible for assuring 'that state courts will not be the final arbiter of important decisions under the Federal Constitution'. 309 U.S. 551, 557, 60 S. Ct. 676, 679, 84 L. Ed. 920 (1940)."

The Court stated further that it would be inappropriate to dismiss the case and require that it be refiled in federal court because it would be a partial inroad on the *Rooker-Feldman* doctrine.

Petitioner construes this to be an inconsistent application of the *Rooker-Feldman* doctrine. In fact, it is clearly the opposite. The Court clearly stated that the *Rooker-Feldman* doctrine would not demand that the appeal be dismissed. Ironically, Petitioner fails to recognize that the case in *Asarco* proceeded just as his state court appeal could have. It proceeded through the state courts and was subsequently appealed to this Court. In contrast, Petitioner failed to even appeal from the Michigan Court of Appeals to the Michigan Supreme Court. He also failed to then appeal to this Court as is required by the *Rooker-Feldman* doctrine. There is no inconsistency between what the *Rooker-Feldman* doctrine requires and what was held in *Asarco*.

C. There is no conflict in the circuits in applying the *Rooker-Feldman* doctrine.

Petitioner attempts to manufacture a conflict between the federal circuits in how the *Rooker-Feldman* doctrine has been applied. He cites to *Ellman v. Standard Federal Bank* as a case in which the Sixth Circuit applied the *Rooker-Feldman* doctrine. 46 Fed. Appx. 792 (6th Cir. 2002). In this case, Standard Federal Bank foreclosed on a number of loans and just prior to the expiration of the redemption period, the plaintiff filed a lawsuit in Michigan state court claiming that the Michigan foreclosure statutes violated due process. The parties were then able to reach a workout agreement. However, plaintiff fell out of compliance with the agreement and Standard Federal pursued a complaint for possession in Michigan state court. The state court issued a judgment of possession in favor of Standard Federal and the plaintiff unsuccessfully appealed before the Court of Appeals and the Michigan Supreme Court. Plaintiff did not seek certiorari to this Court under 28 U.S.C. § 1254.

After all of the state appeals were exhausted, he filed a suit in federal district court. The district court, and then on appeal, the Circuit Court of Appeals, determined that the *Rooker-Feldman* doctrine precluded the district court from exercising subject matter jurisdiction over the real property claims. The court stated that:

> "In short, if Ellsman wished to further challenge the defendant's refusal to accept his negotiated high bid for the Birmingham property, he should have filed for *certiorari* in the United States Supreme Court."

Id. at 797.

Petitioner also cites to *Thornblad v. Anderson* in his petition for writ of certiorari. 104 Fed. Appx. 610 (8th Cir. 2004). On appeal, the Eight Circuit likewise held that the *Rooker-Feldman* doctrine barred the federal complaint because the constitutional challenges had already been decided by the Minnesota state courts.

Finally, Petitioner cites to *Wexler v. Lepore*, 385 F.3d 1336 (11th Cir. 2004). In this case, the plaintiff filed two actions challenging the recount election system in fifteen of Florida's counties. The claims were based exclusively under Florida law. Subsequently, the plaintiff, along with other parties, filed a federal suit alleging violations of the U.S. Constitution. The court primarily discussed the application of the *Younger* doctrine, but did discuss the *Rooker-Feldman* doctrine in footnote 5. The court stated that no federal claims were litigated in the state court. In fact, the Florida Appellate Court stated that any attempt to amend the complaint to raise a "cognizable constitution claim would be futile." *Id.* at 1340. On this basis, the Eleventh Circuit held that the *Rooker-Feldman* doctrine did not bar the federal lawsuit.

Of the three cases cited, only *Wexler* did not apply the *Rooker-Feldman* doctrine. However, this does not mean that there is a conflict among the circuits. The Eleventh Circuit logically reasoned that because no federal constitutional claims were litigated that the plaintiff should not be precluded from raising them in a federal lawsuit. This is

consistent with this Court's decision in *England v. Louisiana State Board of Medical Examiners*, 373 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) when this Court stated:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a federal district court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims."

Id. at 415.

Respondent is not arguing that Petitioner is precluded from raising his claims under the *Rooker-Feldman* doctrine when they were *not* litigated in the state courts. In fact, they were litigated in the Michigan state courts. question #2 of Petitioner's statement of questions in the appeal before the Michigan Court of Appeals stated:

> "Since the XIV Amendment to the U.S. Constitution guarantees a citizen the right to have due process of law, was it proper and legal for a permanent injunction to be placed against the plaintiff/appellant which would preclude the Ottawa County Clerk to file any litigation without a complaint being first reviewed by a circuit judge."

See Respondent's Appendix at App. 5.

By Petitioner's own brief and admission, he raised the same issues in this case in the Michigan Court of Appeals. Likewise, the Michigan Court of Appeals held that the plaintiff was afforded due process. See *Wabeke v. City of Holland*, 1999 WL 33453855 (1999) and Respondent's Appendix at App. 28-30. As a result, the Court of Appeals addressed these issues and decided it in the appeal. There is no basis for Petitioner to now claim that he did not raise these issues with the Court of Appeals. Clearly, there is no conflict in the application of the *Rooker-Feldman* doctrine.

III. THE WESTERN DISTRICT OF MICHIGAN AND THE SIXTH CIRCUIT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The *Rooker-Feldman* doctrine does not violate the supremacy clause.

Petitioner makes the unfounded statement that state courts are not required to follow and apply federal law. Petitioner's statement is clearly in error with well-established authority of this court. See *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

In *Howlett*, this Court succinctly explained the supremacy clause and its importance in relation to the states. It stated:

> "Federal law is enforceable in state courts not because Congress has determined that Federal Courts would otherwise be burdened or that State Courts might provide a more convenient forum – although both might well be true – but, because the Constitution and laws passed pursuant to it are much in the states and laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with coordinating responsibility to enforce the law according to the regular modes of procedure. The laws of the United States are laws in the several states, and just as much bonding on the citizens and courts thereof as the state laws are . . . the two together form one system of juris prudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor are they treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman*, 93 U.S. 130, 136-137, 23 L. Ed. 833 (1876); *Minneapolis & St. Louis R.*

> *Co. v. Bombolis*, 241 U.S. 211, 222, 36 S. Ct. 595, 598, 60 L. Ed. 961 (1916)."

Id. at 367.

Petitioner's claims are based on hyperbole and the assumption that the state courts are somehow hostile to the federal courts and will not enforce federal rights. This is clearly contrary to established law. This Court has stated:

> "It has been asserted that the federal government is foreign to the state government; and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither hostile to the state governments, nor is it hostile to them. It proceeds under the same people, and as much under their control as the state governments.
>
> Where, by the Constitution, the power of the legislation is exclusively vested in Congress, they legislate for the people of the union, and their acts are as binding as are the Constitutional enactments of the state legislature and the people of the state."

Id. at 367 citing *Worcester v. Georgia*, 6th Pet. 515, 571, 8 L. Ed. 483 (1832).

After setting forth these general principles, this Court in *Howlett* stated that one corollary of these principles is that a state court must address a federal issue when the parties in controversy are properly before it. *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-388, 49 S. Ct. 355, 356-357, 73 L. Ed. 747 (1929). Moreover, "the existence of the jurisdiction creates an implication of duty to exercise it." *Mondou v. New York, N. H. & H. R. Co.*, 223 U.S. 1, 58, 32 S. Ct. 169, 178, 56 L. Ed. 327 (1912). The Court in *Howlett* further stated:

> "To understand why this is so, one needs only to imagine a contrary system in which the Supremacy Clause operated as a constraint on the activity of

> State-Court Judges like that imposed on other state actors, rather than as a rule of decision. On that hypothesis, state courts would be subject to the ultimate superintendence of federal courts which would vacate judgments entered in violation of federal law, just as they might overturn unconstitutional state legislative or executive decisions. Federal courts would exercise a superior authority to enforce and apply the constitutional laws passed pursuant to it." See *Wechsler, The Appellate Jurisdiction of the Supreme Courts; Reflections on the Law and Logistics of Direct Review*, 34 Wash. & L. Rev. 1043, 1047 (1977). (Describing and rejecting alternative view of Supremacy Clause, as intrusive on state autonomy.) "The language of the Supremacy Clause – which directs that 'the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the contrary notwithstanding' – and are cases confirm that state courts have the coordinate authority and the consummate responsibility to enforce the supreme law of the land. Early in our history, in support of the Courts' power of review over state courts, Justice Story anticipated that such courts 'in the exercise of their ordinary jurisdiction . . . would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. *Martin v. Hunter Lessee*, 1 Wheat., at 342 and would decide federal questions even when, pleaded in replication, they were necessary to the plaintiff's case."

Id. at 370.

The *Rooker-Feldman* doctrine emanates from this corollary because it provides that a federal court cannot entertain an original action alleging that a state court improperly applied a federal law or a provision of the constitution. It also predisposes that state courts presumptively have the obligation to apply federal law to a dispute before them and not deny a federal right in the absence of a valid excuse.

Petitioner's contentions fly in the face of these well-recognized principles between the federal and state courts. This Court should not undermine what has been clearly established law for nearly the past two centuries based upon sound legal and policy purposes.

B. The *Rooker-Feldman* doctrine does not violate the separation of powers doctrine.

Like much, if not all of the litigation which Petitioner has filed, Petitioner's argument in this proceeding is completely devoid of any basis in law. It is clear that this Court has appellate authority over the highest state courts. As a result, parties are not without a remedy when state courts inappropriately apply federal law. They have recourse by filing a petition for writ of certiorari with the U.S. Supreme Court after adjudication of an issue in the highest state court. There is no basis in law to claim that state courts can freely and without any accountability apply incorrectly federal law.

Petitioner's argument also misunderstands the separation of powers doctrine. As cited by the Petitioner, this Court in *Martin v. Hunter-Lessee*, stated:

> "The object of the constitution was to establish three great departments of government, the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them."

14 U.S. 304, 4 L. Ed. 97 (1816). The separation of powers doctrine is a principle that applies to and between the three departments of the federal government. A primary responsibility of this Court is to balance the peoples' protection against the abuse of power by other branches of government. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947). The *Rooker-Feldman* doctrine does not preclude the federal courts from protecting against the abuse of power by other federal branches. In addition, it does not give state courts carte blanche to apply federal law that is contrary to the

U.S. Constitution. The appellate jurisdiction of this Court assures people that the state courts will properly apply federal law. Petitioner did not avail himself of this right and is now asking this Court to circumvent this process without any basis.

C. The *Rooker-Feldman* doctrine does not violate the First Amendment.

Petitioner is asking that this Court carve out the "Wabeke" exception to this long-standing doctrine for the First Amendment. There is no judicial authority for this proposition. Moreover, there is no analytical basis for distinguishing why one constitutional right should be given priority over all others. Petitioner is free to exercise his First Amendment rights in numerous ways (i.e., writing letters to the editorial criticizing the City of Holland; attending at speaking at City Council meetings, running for office, etc.).[9] In fact, the Petitioner has done and continues to exercise his First Amendment rights in this manner. The *Rooker-Feldman* doctrine does not undermine Petitioner's rights. Instead, accepting Petitioner's spurious claims which have been meticulously reviewed by a multitude of judges and courts would have the effect of substantially undermining the basis of the doctrine and weakening its import. This would have significant implications for the relationship between the federal and state courts.

As indicated previously, this Court has recognized the competence of state courts to adjudicate federal constitutional claims. See also Argument IV of Respondent in this Argument section. Petitioner is requesting that this line of

---

[9] He is also free to file suit in state court. The ***only*** limitation is that if the suit is against the City of Holland or its officials or employees (and does not allege personal injury or property damage), he must demonstrate to a judge that it is not frivolous. As noted by Judge McKeague, no one has a right to pursue frivolous litigation. See Respondent's Appendix at App. 17.

cases be overruled or substantially curtailed. There is no merit to this claim.

IV. EVEN IF THE *ROOKER-FELDMAN* DOCTRINE DOES NOT APPLY, THERE WAS HARMLESS ERROR IN THE LOWER COURT'S DECISIONS BECAUSE FEDERAL COURTS HAVE CONSISTENTLY HELD (AND IN A WAY THAT DOES NOT CONFLICT WITH THIS COURT'S OPINION) THAT THE RIGHT OF ACCESS TO THE JUDICIAL SYSTEM IS NOT ABSOLUTE AND MAY BE SUBJECT TO REASONABLE SAFEGUARDS INCLUDING THE AUTHORITY TO AWARD SANCTIONS AND TO REQUIRE THAT THERE BE MERIT AND LAW IN FACT TO PURSUE A LAWSUIT.

This Court has stated:

> "Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice."

In re MacDonald, 489 U.S. 180, 184, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989). In that case, this Court held that it is within the inherent powers of the court to apply appropriate restrictions on a litigant's ability to commence abusive litigation in forma pauperis." See *Id.*

Many courts of appeals have addressed this right of access to the courts. The D.C. Circuit has held that the right of access to the courts is neither absolute nor unconditional. *In re Green*, 669 F.2d 779 (D.C. Cir. 1981). Moreover, the Tenth Circuit has held that there is no constitutional right of access to the court to prosecute an action that is frivolous or malicious. *Phillips v. Karey*, 638 F.2d 207 (10th Cir.), cert. denied, 450 U.S. 985, 101 S. Ct. 1524, 67 L. Ed. 2d 821 (1981). The Fifth Circuit has stated that "no one, rich or poor, is entitled to abuse the judicial

process." *Hardwick v. Brinson*, 523 F.2d 798, 800 (5th Cir. 1975). The Tenth Circuit has stated as follows:

> "There is a strong precedent establishing the inherent power of federal courts to regulate the activity of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances."

Kotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986).

There are a number of cases that have followed this precedent. The Tenth Circuit has held that numerous "onerous conditions" may be imposed on the litigant as long as they are designed to assist the district court in curbing the particular abusive behavior involved. *Carter v. United States*, 733 F.2d 735 (10th Cir. 1984), cert. denied, 469 U.S. 1161, 105 S. Ct. 915, 83 L. Ed. 2d 928 (1985). In addition, the D.C. Circuit required a litigant to certify that the claims advanced have never been raised before. *In re Green*, 669 F.2d 779 (D.C. Cir. 1981). In addition, the Fourth Circuit has upheld a prefiling review and the denial of a leave to file an in forma pauperis except upon a showing of good cause. *Graham v. Riddle,* 554 F.2d 133 (4th Cir. 1977). The Seventh Circuit upheld court review and approval before acceptance of any proposed litigation. *Sassower v. American Bar Association*, 33 F.3d 733 (7th Cir. 1994). The Seventh Circuit also required the plaintiffs to pay all costs and attorney fees imposed and to post a bond before allowing them to file another lawsuit against the defendants. *United States ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669 (7th Cir. 1995). The Sixth Circuit upheld an injunction imposing prefiling restrictions. *Callihan v. Kentucky*, No. 01-6555 (6th Cir. June 12, 2002). Likewise, the Sixth Circuit also firmed a court order requiring the plaintiff to file a $25,000 cash bond and other restrictions on any future actions against the defendants. *Stewart v. Fleet Financial*, 2000 WL 1176881 (6th Cir. August 10, 2000).

Based on this inherent authority, the Ottawa and Allegan County Circuit Courts have placed reasonable and limited restrictions on Petitioner's right to commence lawsuits

against the City of Holland, and any of its officials (including the Respondent).[10] Petitioner's frivolous lawsuits over the years have forced the City of Holland to incur significant attorney fees. It is reasonable that Petitioner be required to pay some of these fees as a condition to filing any future litigation. Likewise, the limitation on any

---

[10] The order of the Honorable Calvin L. Bosman provides:

> "A permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by Plaintiff against Defendant City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a Circuit Judge for the County of Ottawa for compliance with M.C.R. 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically exempted from this permanent injunction is any cause of action by the Plaintiff which cites a personal injury to the Plaintiff or to any of his property."

See Judge Bosman's October 13, 1997 judgment and Respondent's Appendix at App. 10-11.

The Honorable Harry A. Beach of the Allegan County Circuit Court entered a judgment against Petitioner that provides:

> "That a permanent injunction is hereby issued precluding the Allegan County Clerk from accepting any litigation filed by the Plaintiff against the Defendant City of Holland, any of its officials or any of its agents who have acted in the capacity as agents or officials for the City of Holland until the Complaint of the Plaintiff has been reviewed by the presiding Judge for the County of Allegan for compliance with M.C.R. 2.114(D) and upon receipt or evidence of a receipt to the Allegan County Clerk evidencing payment of all costs in any proceedings previously imposed against the Plaintiff and in favor of the Defendant. Specifically exempted from this permanent injunction is any cause of action by the Plaintiff which cites a personal injury arising from the tortuous conduct of the Defendant, its officials or agents, which results in personal injury to the Plaintiff himself or any of his property."

See Judge Beach's May 17, 2002 judgment and Respondent's Appendix at App. 40.

future lawsuit having merit in law and fact is merely a requirement of the state court rules and is the equivalent to Rule 11 under the Federal Rules of Civil Procedure. The state court orders provide exceptions to preserve Petitioner's rights such as any personal property or personal injury claims. Contrary to Petitioner's contentions, this will not "chill" his right to access the courts. Rather, the injunctions will require that Petitioner have a valid basis before filing against the City and its officials and will assist in the preserving of judicial resources. This is a standard which is required of all litigants which should include and not exclude the Petitioner. Moreover, Petitioner has an unlimited right to file a lawsuit against the city or its officials relating to any personal injury or property damage.

V. EVEN IF THE *ROOKER-FELDMAN* DOCTRINE DOES NOT APPLY, THERE WAS HARMLESS ERROR IN THE LOWER COURT'S DECISIONS BECAUSE RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY AS CITY ATTORNEY FOR THE CITY OF HOLLAND.

This Court has held that private defendants, such as doctors or lawyers, who perform services at the behest of the government are entitled to governmental immunity. See *Richardson v. McKnight*, 521 U.S. 399, 138 L. Ed. 2d 540, 117 S. Ct. 2100 (1997). In addition, the Sixth Circuit has held that a law firm hired by the City of Louisville to serve as outside counsel was entitled to qualified immunity under Section 1983 claims. *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), cert. denied, 523 U.S. 1094, 140 L. Ed. 2d 792, 118 S. Ct. 1560 (1998).

In this case, Respondent was clearly acting in his capacity as City Attorney for the City of Holland. As is the case with all city attorneys in the State of Michigan, the city attorney position is not elected. Rather, it is an appointed position by the governing body for the municipality. Moreover, Respondent's defense of Petitioner's complaint in both the Ottawa and Allegan County Circuit

Courts was within the scope of his duties as City Attorney for the City of Holland. As a result, the qualified immunity doctrine applies.

The purpose of the qualified immunity doctrine recognizes that substantial costs can be incurred through litigation over the subjected good faith of government officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In addition, this Court has stated:

> "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known."

Id. at 818.

In addition, the statutory constitutional rights must have been "so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from such conduct." *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). The objective reasonableness standard "focuses on whether defendants reasonably could have thought that their actions were consistent with the rights that plaintiff's claims have been violated." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993).

Petitioner alleges that Respondent violated his due process rights under the Fourteenth Amendment of the U.S. Constitution when the state circuit courts granted the injunctive relief sought by the Respondent. There can be no doubt that Respondent was acting in his official capacity when he was representing the City of Holland in state court litigation.

Secondly, Respondent finds no authority to indicate that injunctive relief, of the limited type granted by the state circuit courts, is a violation of Petitioner's due

process rights.[11] More importantly, there is no authority to indicate that constitutional rights in this area have been so clearly established as to clearly prohibit injunctive relief of the type granted by the state circuit courts. There simply is no authority to indicate that Petitioner has an unabated and unqualified constitutional right to file frivolous actions. Absent clearly developed constitutional law in this area, qualified immunity applies.

In a similar case, a prisoner filed a law suit against the county, a circuit court, the judge for the circuit court, and the circuit court administrator, claiming that they deprived the plaintiff of his rights to access to the courts, due process, equal protection, and conspired to deprive him of his rights. *Fields v. County of Lapeer*, 2000 U.S. App. LEXIS 29182 (6th Cir. 2000). The allegations arose from the court's repeated rejection for filing a civil complaint for legal malpractice. On three occasions, the complaint was rejected for failure to file in accordance with the court rules. On appeal, the Sixth Circuit stated that requiring a litigant to comply with local and state court rules does not deprive that litigant of his right to access to the courts. *Id.* citing *Brandenburg v. Beaman*, 632 F.2d 120 (10th Cir. 1980). "It is incumbent on litigants, even those proceeding pro-se, to follow the . . . rules of procedure." See *Id.* On this basis, the Sixth Circuit rejected the petition for writ of mandamus.

The Federal Rules of Civil Procedure also support the injunctions of the Ottawa and Allegan County Circuit Courts. Fed. R. Civ. P. 11 is similar to M.C.R. 2.114. In addition, Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a claim sua sponte if there is a basis for dismissal that is sufficient from the plaintiff's pleadings. See *Tate v. Burke*,

[11] In fact, the cases cited in Argument VII of this brief and by Judge McKeague in the lower court's opinion show exactly the opposite. There is substantial authority for courts to place reasonable limitations on a party's ability to file litigation.

131 F.R.D. 363 (D.C. Cir. 1990). The sua sponte dismissal of a pro se complaint without providing plaintiff with an opportunity to be heard is well-established. See *Brown v. District Unemployment Compensation Board*, 411 F. Supp. 1001 (D.C. 1975). See also J. Moore, *Federal Practice*, Para. 0 60 [6] (2d ed. 1975).

Based upon this authority, Respondent had more than adequate legal grounds for requesting this relief from the Ottawa and Allegan County Circuit Courts. There is no basis to assert that Respondent violated any clearly established constitutional rights.

VI. PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS AND THIS COURT SHOULD AWARD COSTS TO THE RESPONDENT.

Subsection 2 of this Court's Rule 42 authorizes this Court to award damages and costs for filing a frivolous petition for writ of certiorari. It provides:

> "2. When a petition for writ of certiorari, an appeal, or an application for other relief is frivolous, the court may award the respondent or appellee just damages, single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both the party and counsel."

This Court's Rule 43 also allows for the tax of printing costs for an appendix.

Petitioner's petition for writ of certiorari is frivolous. It is reflective of the at least 19 lawsuits that Petitioner has filed against the City of Holland and its officials. Responding to these frivolous lawsuits consumes precious public resources and the costs of having to respond to Petitioner's frivolous petition should be awarded to the Respondent.

Cunningham Dalman, P.C. is a private law firm that represents the City of Holland. For these types of matters, its hourly rate is $102.50. This is reasonable because it is actually below what is charged in this locality. Respondent estimates that approximately 20 hours of attorney fee time will be billed for the preparation of this brief in opposition to writ of certiorari. A total cost for attorney fees would be $2,050.00. It is anticipated that the copying costs for this appendix are $963.60. In total, $3,013.60 will be incurred to respond to this petition. Because of the petition's frivolous nature, Respondent requests that this Court award costs against Petitioner in the amount of $3,013.60.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari and award to Respondent $3,013.60 for Petitioner filing a frivolous petition.

Respectfully submitted,

CUNNINGHAM DALMAN, P.C.

Dated: February 17, 2005

RONALD J. VANDER VEEN
(P33067)
Attorneys for Respondent
Andrew J. Mulder
321 Settlers Road
P.O. Box 1767
Holland, MI 49422-1767
(616) 392-1821

App. 1

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PAUL E. WABEKE, (PLAINTIFF IN PRO PER) (APPELLANT) v CITY OF HOLLAND, (DEFENDANT) (APPELLEE)	M.C.O.A. # 207260-C O.C.C.C.# 97-28451-CZ APPELLANT'S BRIEF

Since the plaintiff/appellant believes that the facts, statements, and averments contained within the APPELLANTS' BRIEF, along with the official records, speak adequately for themselves . . . and with the plaintiff being desirous of avoiding using the time of the court unnecessarily, the plaintiff/appellant hereby waives the right to ORAL ARGUMENT.

/s/ Paul E. Wabeke
(Paul E. Wabeke,
plaintiff in pro per/appellant)
PO Box # 1132 Holland, Mi. 49423

Dated: December 19, 1997

TABLE OF CONTENTS

I. PRELIMINARY DISCUSSION.

II. INDEX OF AUTHORITIES.

III. STATEMENT FOR THE BASIS FOR JURISDICTION.

IV. STATEMENT OF QUESTIONS.
V. STATEMENT OF FACTS.
VI. LAW/ARGUMENT.
VII. RELIEF SOUGHT.
VIII. PROOF OF SERVICE.

I.

PRELIMINARY DISCUSSION

The plaintiff in pro per/appellant has a well-established history of filing litigations involving the City of Holland over a considerable period of time. More specifically, the legal actions pertain to unlawful actions within city government. In one such case, (O.C.C.C. # 91-15029-CZ), the official court files are over 15 inches thick . . . and has never once touched upon the merits or issues involved. That case embraces the well-documented, unlawful diversion of public funds to a (so-called) non-profit private corporation, as well as the equally unlawful exchange of (so-called) "surplus" municipal property to the same corporation without first offering the property to the public by means of sealed bids, as is required by Michigan statutes.

The instant case/appeal is rooted in a temporary injunctive order which the plaintiff/appellant was seeking, to restrain city officials from expending additional funds for costly feasability studies for a revamping of a city project known a [sic] Windmill Island, from a tourist attraction to an "authentic" dutch village, at an estimated cost of $44.9 million dollars (" . . . give or take 25% . . . " a remark by the city manager). The plaintiff sought the injunction in order for the issue to be submitted to a referrendum vote

by city residents. *That case was finally terminated by order dated August 15, 1997.*

Because the order being appealed is dated October 13,1997 . . . captioned *within the same case which was finally terminated on August 15, 1997*, as well as the fact that the instant action is a direct violation of the plaintiff in pro per/appellants' right to have due process of law (XIVTH AMENDMENT), the plaintiff/appellant (rightfully) brings on the appeal. For if the October 13th order was to stand, any future legal action contemplated against City of Holland would, in essence, be tried in court even before the case was filed.

The plaintiff/appellant (rightly) avers that the order, dated October 13, 1997, (the subject of appeal), represents a glaring, desparate *attempt* on the part of counsel for City of Holland to, once and for all, silence the plaintiff in his honorable, legitimate exposure of wrong-doing within the City of Hollands' governing body.

In further connection with the said Windmill Island project, the instant plaintiff is also in the process of filing a *citizens complaint* (not the initiation of a law suit per se), in accordance with M.C.R. # 6.101 (C) and the staff comments related thereto, alleging the well-documented, wrongful act of utilizing GENERAL FUNDS for the payment of the remaining maturities of REVENUE BOND SERIES 1988, totally contrary to Michigan Revenue Bond Act Of 1933 (ACT # 94).

Even though the Windmill Island project brought in total revenues, of $886,541.00 in FY 1995 and FY 1996, which constitutes a first lien on the revenue bonds, on July 1, 1997 the city transferred $68,415 out of the GENERAL FUND to pay the FY 1997 payment on the bonds, and has

gone on official record of intending to transfer a total of $406,869 from the GENERAL FUND to pay off the bonds by FY 2002-2003.

A glaring foot note to all of this is the fact that the project for which the bonds were sold in 1988 *HAS NEVER BEEN BUILT.*

II.

INDEX OF AUTHORITIES

BLACKS' LAW DICTIONARY (re FINAL ORDER):

> "One which *terminates* the litigation between the parties and the merits of the case, *and leaves nothing to be done but to enforce by execution what has been determined."*
>
> (emphasis by plaintiff)
>
> Richardson v Jones, CA Pa, 551 F 2d 918, 921

****

XIV TH AMENDMENT TO THE U.S. CONSTITUTION re: DUE PROCESS OF LAW.

III.

STATEMENT OF THE BASIS FOR JURISDICTION

This appeal, by right, is presented pursuant to M.C.R. # 7.203 (A)-(1).

The order, which is the subject of the instant appeal, is a "final" order of the dismissal of O.C.C.C. file # 97-28451, which was dated October 13, 1997.

The plaintiff/appellants' CLAIM OF APPEAL (BY RIGHT) was filed with the Clerk of Michigan Court Of Appeals on October 29, 1997.

IV.

STATEMENT OF QUESTIONS

QUESTION # 1

Since it is most obvious that a final order or judgment which dismisses a case is a *termination* of the case, was it proper for defendant/appellee to file a brand new motion, *captioned within the same case which was finally terminated on August 15, 1997.*

The most logical and obvious answer is *NO.*

QUESTION # 2

Since the XIVth Amendment to the U.S. Constitution guarantees a citizen the right to have due process of law, was it proper and legal for a permanent injunction to be placed against the plaintiff/appellant, which would preclude the Ottawa County Clerk to file any litigation without a complaint being first reviewed by a circuit judge?

The obvious answer is *NO.* . . . for if this order was to stand, in true essence, a case would be tried even before it was filed.

QUESTION # 3

Since the plaintiff/appellant' dire indigency is well-known in the community, which has seen the granting of numerous

waivers of fees in various courts, including The Michigan Court Of Appeals, was it proper and just for the circuit judge to require receipt evidencing payment of prior costs imposed upon plaintiff in favor of defendant? The reasonable answer is obviously NO . . . for even in the case *finally terminated on August 15th*, the order of October 13th (wrongly) assessed $500.00 costs against plaintiff.

QUESTION # 4

Since the order, dated *August 15, 1997* was a *final termination of the case,* why, in the order *dated October 13,1997*, did the order state:

1. "That the complaint of the plaintiff is hereby dismissed . . . ", especially since the case was already actually dismissed on August 15th?

The plain and simple answer demonstrates a desparate *attempt* to, once and for all, silence the plaintiff in his lawful pursuit of the exposure of well-documented wrongdoing within the governing body of the City of Holland.

V.

STATEMENT OF FACTS

a). This is a civil action, centered in Ottawa County Circuit Court (# 97-28451-CZ).

b). The appeal is seeking a (proper and legitimate) invalidation of the order, dated *October 13, 1997*, which was entered *AFTER THE FINAL TERMINATION OF THE CASE IN WHICH THE INSTANT CASE WAS CAPTIONED.*

c). The basic facts in controversy resides in the order, *dated October 13, 1997*, which involved a motion for a permanent injunctive order to restrain plaintiff from filing any further litigation without the approval of a circuit judge. The order is actually invalid because it was filed and captioned within the same case *which was finally terminated* on August 15, 1997. Additionally, the order is invalid because, on its face the October 13, 1997 order is a direct violation of the plaintiffs' right to have due process of law under the XIVth Amendment to the U.S. Constitution . . . for if the October 13th order was to stand, a matter would, in true essence, be tried in court even before the case was filed.

d). Dates of important instruments and events:

Final termination of O.C.C.C.# 97-28451-CZ *August 15, 1997.*

Date of order, captioned in the same case which had already been terminated (which is the subject of the appeal: *October 13, 1997.*

e). Verdict and judgment:

On October 13, 1997 the presiding judge abused his judicial power by entering the order which was captioned in the same case *which was finally terminated on August 15, 1997.* During a hearing in said regard, the plaintiff voiced his vigorous objections to the order signed after the final termination of the case.

VI.

LAW/ARGUMENT

Based upon the facts, statements and averments contained within this brief, the plaintiff in pro per/appellant believes that a (proper) solution to the matter at hand, involving specifically the order dated October 13, 1997, is actually a rather plain and simple matter. For when a case is *finally terminated and dismissed* " . . . and leaves nothing to be done but to enforce by execution what has been determined", it certainly means just that.

Even if one were to try to ignor the allegations with regards to the violation of the XIVth Amendment to the U.S. Constitution regarding a citizens' right to have due process of law, the very fact that the order, dated October 13, 1997, was signed and entered 2 months *AFTER* the case had already been officially dismissed and terminated on August 15, 1997 is actually all that is required to invalidate the order dated October 13, 1997

With these facts and circumstances on record, the plaintiff/appellant respectfully avers that it is indeed encumbent upon the court for an immediaete invalidation of the order of October 13, 1997, thereby rendering the said order to be of no binding force or legal efficacy.

VII.

RELIEF SOUGHT

In a true spirit of justice and equity, and based upon the various facts and statements as are averred in the brief, the plaintiff in pro per/appellant respectfully prays that the court will invalidate the order, signed by Ottawa County Circuit Court Judge Calvin L. Bosman, dated

October 13, 1997, leaving the said order thereby to be of no binding force or legal efficacy.

Additionally, the plaintiff/appellant prays that, caused by the untenable circumstances detailed within, he is fully entitled to a fair and reasonable assessment of costs against defendant in favor of the plaintiff, which the plaintiff/appellant has (unnecessarily) incurred because of this appeal., pursuant to, and in accordance with M.C.R.7.219 (F).

RECEIPT FOR THE HAND-DELIVERY OF LEGAL DOCUMENTS

I, Paul E. Wabeke, personally hand-delivered a true copy of the following legal documents to the office of Andrew J. Mulder, located at 321 Settlers Road, Holland, Mi.:

1. APPELLANTS' BRIEF.
2. PROOF OF SERVICE.

/s/ Paul E. Wabeke
(Paul E. Wabeke,
plaintiff in pro per/appellant)
PO Box # 1132 Holland, Mi. 49423

RECEIVED ON BEHALF OF DEFENDANT/APPELLEE CITY OF HOLLAND/ANDREW J. MULDER:

RECEIVED BY: _____

TITLE: _____

DATE OF HAND-DELIVERY: _____

_____

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PAUL E. WABEKE, Plaintiff v. CITY OF HOLLAND, Defendant.	File No. 97-28451-CZ Honorable Calvin L. Bosman, Assigned Judge JUDGMENT FOR DISMISSAL, PERMANENT INJUNCTION, AND AWARD OF COSTS

Paul E. Wabeke, Plaintiff
In Pro Per
PO Box 1132
Holland, MI 49422-1132

Andrew J. Mulder P 26280
CUNNINGHAM DALMAN, P.C.
attorneys for Defendant
321 Settlers Road
Holland, MI 49423
616-392-1821

At a session of the above Court, held in the City of Grand Haven, County of Ottawa, State of Michigan, on this 13th day of October, 1997.

PRESENT: Honorable Calvin L. Bosman
Circuit Court Judge

This cause coming on to be heard pursuant to the Motion of the Defendant, City of Holland, pursuant to MCR 2.116(C)(8) seeking to dismiss the Complaint of the Plaintiff for failure to state a cause of action; requesting the issuance of a permanent injunction pursuant to MCR 2.114(E); and the award of costs for frivolous and vexatious proceedings by the Plaintiff; the Court having

reviewed the Motion and Brief filed by the Defendant, the response of the Plaintiff, the oral arguments of the Plaintiff and the Defendant, and the Court having rendered its verbal opinion on September 8, 1997;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That the Complaint of the Plaintiff is hereby dismissed, with prejudice, pursuant to MCR 2.116(C)(8) for failure of the Plaintiff to state a cause of action.

2. That a permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by the Plaintiff against the Defendant, City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a circuit judge for the County of Ottawa for compliance with MCR 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically excepted from this permanent injunction is any cause of action by the Plaintiff which cites a personal injury arising from the tortious conduct by the Defendant, its officials, or agents, which results in personal injury to the Plaintiff himself or to any of his property.

3. That costs are assessed in the amount of $500 against the Plaintiff and in favor of the Defendant in this cause.

/s/ Calvin L. Bosman
Calvin L. Bosman,
Circuit Court Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Plaintiff,	)	Case No. 1:03-cv-221
v.	)	Honorable David W. McKeague
ANDREW J. MULDER, et al.,	)	**MEMORANDUM OPINION**
Defendants.	)	

This is a civil action brought by a *pro se* plaintiff. Plaintiff seeks an order from this court overturning injunctions issued against him by state court judges in an effort to deter plaintiff from filing frivolous lawsuits. Plaintiff named as defendants Ottawa County Circuit Court Judge Calvin Bosman; Allegan County Circuit Court Judge Harry Beach; and Holland, Michigan's City Attorney, Andrew J. Mulder. Defendants Bosman and Beach issued the injunctions. Attorney Mulder defended the City of Holland in the two lawsuits in which the state courts found that injunctive relief against plaintiff was warranted.

Plaintiff filed this lawsuit on April 3, 2003. On May 15, 2003, the court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing plaintiff's claims against them with prejudice. (docket # 33).[1] On May 20,

---

[1] Plaintiff did not proceed *in forma pauperis*, therefore, his complaint was not subject to initial screening.

2003, defendant Mulder filed a motion to dismiss. (docket # 38). The court issued an order notifying plaintiff of his opportunity to respond to defendant's motion. (docket # 41). Plaintiff has filed his response (docket # 42, 44) and the matter is ready for decision. For the reasons set forth herein, defendant's motion to dismiss will be granted.

Applicable Standard

Federal courts are courts of limited jurisdiction which may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994). Therefore, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen,* 511 U.S. at 377 (citations omitted). The first and fundamental question presented by every case brought to the federal district court is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue. *See Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986). "Quite aside from whether the parties raise jurisdictional issues themselves – or even attempt to consent or agree to federal jurisdiction – federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Douglas v. E.G. Baldwin Assoc., Inc.,* 150 F.3d 604, 606 (6th Cir. 1998).

Plaintiff has the burden of proving this court's subject matter jurisdiction. *See Nichols v. Muskingum College,* 318 F.3d 674, 677 (6th Cir. 2003); *Angel v. Kentucky,* 314 F.3d 262, 264 (6th Cir. 2002); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

Defendant's motion seeks dismissal pursuant to Fed. R. Civ. P 12(b)(1). The Sixth Circuit recognizes two types of 12(b)(1) motions: a "facial" attack challenging the sufficiency of the plaintiff's factual allegations, in which all well-pleaded factual allegations in the complaint are taken as true; and a "factual" attack challenging the actual fact of subject-matter jurisdiction, which is analyzed under Fed. R. Civ. P. 56 standards. *See Nichols,* 318 F.3d at 677; *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.3d 320, 324 (6th Cir. 1990). The difference is often significant, because under a factual challenge the district court is empowered to weigh the evidence, and no presumptions apply as to the truthfulness of plaintiff's allegations. *See United States v. A.D. Roe Co.,* 186 F.3d 717, 721-22 (6th Cir. 1999). The Sixth Circuit has clearly recognized that a district court is empowered to consider evidence beyond the pleadings and to resolve factual disputes when necessary to resolve challenges to subject-matter jurisdiction under Rule 12(b)(1). *See Nichols,* 318 F.3d at 677; *Madison-Hughs v. Shalala,* 80 F.3d 1121, 1130 (6th Cir. 1996); *RMI Titanium Co. v. Westinghouse Elec. Co.*, 78 F.3d 1125, 1133-34 (6th Cir. 1996). Here, defendant makes a factual attack.

Facts

In 1997, plaintiff filed a lawsuit in Ottawa County Circuit Court against the City of Holland. Ottawa County Circuit Court Judge Calvin L. Bosman was the presiding judge. On October 13, 1997, Judge Bosman entered a "Judgment for Dismissal, Permanent Injunction and Award of Costs." *See Wabeke v. City of Holland,* No. 97-28451-CZ (Ottawa County Circuit Court Oct. 13, 1997). (Complaint, Ex. O). Judge Bosman dismissed plaintiff's

complaint for failure to state a claim and assessed costs against plaintiff in the amount of $500. Judge Bosman issued the following injunction:

> [A] permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by Plaintiff against the Defendant, City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a circuit judge for the County of Ottawa for compliance with MCR 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically excepted from this permanent injunction is any cause of action by the plaintiff which cites a personal injury to the Plaintiff or to any of his property.

(Complaint, Ex. O).

Plaintiff sought review of Judge Bosman's decision in the Michigan Court of Appeals. *See Wabeke v. City of Holland,* No. 207260, 1999 WL 33453855 (Mich. Ct. App. Feb. 23, 1999). The Court of Appeals rejected plaintiff's claims that Judge Bosman had abused his discretion and exceeded his authority by entering the order dismissing the case and imposing sanctions. 1999 WL 33453855, at *1. The Michigan Court of Appeals found that plaintiff's history of abusive lawsuits warranted the injunctive relief ordered by Judge Bosman.

> The trial court did not clearly err in determining that sanctions were warranted, and did not abuse its discretion by imposing costs in the

> amount of $500 and by enjoining the circuit court clerk from accepting any furthe pleadings from plaintiff without prior approva from a circuit court judge. The trial court found that plaintiff signed the instant complaint in violation of MCR 2.114(D). This suit was the 17th action filed by plaintiff[2] against defendant and other parties since 1979. All previous actions were dismissed. Sanctions were imposed in several cases; however, plaintiff did not pay as ordered. Plaintiff was afforded due process in connection with the imposition of sanctions. *See People v. Herrara (On Remand),* 204 Mich App 333, 339; 514 NW2d 543 (1994). Plaintiff's documented history of filing frivolous actions and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future.

1999 WL 33453855, at *1. Plaintiff does not allege and has not shown that he sought leave to appeal this decision to the Michigan Supreme Court or that he petitioned the United States Supreme Court for a writ of certiorari seeking review of Judge Bosman's injunction.

---

[2] Plaintiff's prolific litigation activities included multiple lawsuits in this court. *See Wabeke v. Maatman, et al.,* No. 1:91-cv-355 (W.D. Mich. May 30, 1991), *aff'd,* No. 91-1800, 1992 WL 58977, at *1 (6th Cir. Mar. 26, 1992) (*res judicata* barred plaintiff's attempt to assert a cause of action arising out of ten state court lawsuits and seeking eleven million dollars in damages, declaratory relief, and a full-page written apology from defendants to be printed in the local newspaper), *cert. denied,* 506 U.S. 1072 (1993); *Wabeke v. Mulder,* No. 1:92-cv-200 (W.D. Mich. Apr. 22, 1994) (dismissing plaintiff's complaint for failure to state a claim); *Wabeke v. Mulder, et al.,* 4:95-cv-127 (W.D. Mich. Aug. 25, 1995) (granting defendants' motions to dismiss), *aff'd,* No. 95-2099, 1996 WL 571302 (6th Cir. Oct. 4, 1996) (affirming dismissal of plaintiff's claims that Judge Bosman and City Attorney Mulder had conspired to deprive plaintiff of due process of law in his state court suit against the City of Holland as barred by the *Rooker-Feldman* doctrine).

The City of Holland is located within both Ottawa and Allegan Counties. In 2002, plaintiff filed another lawsuit against the City of Holland, this time in the Allegan County Circuit Court. On May 7, 2002, Allegan County Circuit Court Judge Harry A. Beach entered a "Judgment for Defendant for Summary Disposition, Permanent Injunction and Award of Costs." *See Wabeke v. City of Holland,* No. 02-31220-CZ (Allegan County Circuit Court May 7, 2002) (Complaint, Ex. P). Plaintiff does not allege that he sought appellate review of this decision in either Michigan's appellate courts or in the United States Supreme Court.

Plaintiff filed this lawsuit on April 3, 2003.

Discussion

As plaintiff is well aware, this court does not possess direct oversight powers over state courts. It is patent that this court lacks jurisdiction to review the state-court decisions[3] plaintiff attempts to challenge in this lawsuit.

---

[3] The right of access to courts is neither absolute or unconditional, and there is no right of access to the courts to prosecute an action that is frivolous and malicious. *See Tripati v. Beaman,* 878 F.2d 351, 353 (10th Cir. 1989). The injunctions imposed by the state courts are consistent with those issued by federal courts under similar circumstances. *See, e.g., Sassower v. American Bar Ass'n,* 33 F.3d 733, 736 (7th Cir. 1994) (court review and approval before acceptance of any proposed future filings by plaintiff); *United States ex rel. Verdone v. Circuit Court for Taylor County,* 73 F.3d 669, 675 (7th Cir. 1995) (requiring plaintiff to pay all costs and attorney's fees imposed and to post a bond before allowing plaintiff to file another civil lawsuit against defendants); *see also Callihan v. Kentucky,* No. 01-6555, 2002, at * (6th Cir. June 12, 2002) (upholding injunction imposing prefiling restrictions); *Stewart v. Fleet Fin.,* No. 99-2282, 2000 WL 1176881, at *2 (6th Cir. Aug. 10, 2000) (affirming this court's order requiring plaintiff to file

(Continued on following page)

See District of Columbia Circuit Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16 (1923); *United States v. Owens,* 54 F.3d 271, 274 (6th Cir. 1995); *see also Warren v. Garn,* No. 02-1658, 2002 WL 31809068, at *1 (6th Cir. Dec. 12, 2002); *Kovats v. Hi-Lex Corp.,* No. 02-1318, 2002 WL 31780951, at *2 (6th Cir. Dec. 11, 2002); *Metropolitan Life Ins. Co. v. Brown,* No. 02-3318, 2002 WL 31012126, at *1 (6th Cir. Sept. 6, 2002).

"The *Rooker-Feldman* doctrine . . . holds that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley,* 305 F.3d 386, 390 (6th Cir. 2002). Plaintiff certainly disagrees with arguments Attorney Mulder made in state court and believes that Mulder mislead the state court judges. The Michigan Court of Appeals rejected plaintiff's arguments and found that the injunctive relief ordered by Judge Bosman was appropriate given plaintiff's history of litigation abuses. Plaintiff apparently elected not to seek state court appellate review of Judge Beach's decision. Plaintiff's claims against defendant Mulder are inextricably intertwined with the state court judgments. *See Pieper v. American Arbitration Ass'n, Inc.,* No. 01-4043, ___ F.3d ___, 2003 WL 21663246, at *2 (6th Cir. July 11, 2003) ("When granting relief on the federal claim would imply that the state-court judgment on other issues was incorrect, federal courts do not have jurisdiction. . . ."); *see also Baker v. Michigan Family Independence*

---

a $25,000 cash bond and other restrictions in any future action against defendants).

Agency, No. 03-1022, 2003 WL 21674747, at *1 (6th Cir. July 16, 2003); *Riser v. Franklin County Court of Common Pleas,* No. 02-4309, 2003 WL 21774011, at *1 (6th Cir. July 30, 2003) (district court properly found plaintiff's claims barred by the *Rooker-Feldman* doctrine because he sought to relitigate his prior state court actions, even though his intent to do so was veiled by nominal allegations of constitutional violations); *Akers v. Bishop,* No. 02-6235, 2003 WL 21019171, at *2 (6th Cir. May 2, 2003).

Conclusion

For the reasons set forth herein, defendant's motion will be granted and plaintiff's complaint dismissed for lack of subject matter jurisdiction.

Dated: August 18, 2003

/s/ David W. McKeague
David W. McKeague
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Case No. 4:95-CV-127

Plaintiff, HON. DOUGLAS W. HILLMAN

-vs-

ANDREW J. MULDER and JUDGE CALVIN L. BOSMAN,

Defendants. /

OPINION

Before the court in this 42 U.S.C. § 1983 action are defendants' motions to dismiss and plaintiff's motion for summary judgment. Plaintiff Paul E. Wabeke alleges defendants violated his civil rights in a lawsuit he brought against the City of Holland. Defendant Andrew J. Mulder, an attorney, represented the City of Holland. Defendant Judge Calvin L. Bosman heard and decided the case. For the reasons stated below, defendants' motions to dismiss are GRANTED. Plaintiff's motion for summary judgment is DENIED AS MOOT.

FACTS

This case revolves around several procedural issues in an underlying state lawsuit, *Wabeke v. Holland,* Circuit Court No. 91-15029-CZ. In that case, Wabeke sued the City of Holland ("City"). The case was assigned to Judge Bosnian. Shortly after the case was filed, Wabeke entered

a Notice of Default pursuant to MCR 2.603 on the grounds that the City had failed to respond to interrogatories in a timely manner. Wabeke also moved to disqualify Judge Bosman. At approximately the same time, Mulder, on behalf of the City, moved for a bond as security for costs. Mulder stated that Wabeke, a frequent pro se filer, had paid only $57.02 toward $2,367.84 costs awarded the City in a previous lawsuit between the parties. Wabeke does not contest these figures.

Judge Bosman granted the City's motion, and required Wabeke to post a bond as security for costs. Judge Bosman also refused to disqualify himself. When Wabeke failed to post a bond, Judge Bosman dismissed the case, despite Wabeke's objection that the notice of default prevented this action.

Wabeke appealed the dismissal. While the appeal was pending, Wabeke filed suit in this court against Mulder alleging a violation of his due process rights. Judge Gibson, then Chief Judge, dismissed Wabeke's suit pursuant to *Younger v. Harris,* 401 U.S. 37 (1971), on the grounds of abstention. *Wabeke v. Mulder,* 1:92-cv-200 (W.D. Mich. February 24, 1994).

Subsequently, the Michigan Court of Appeals reversed Judge Bosman, holding that the circuit court violated MCR 2.603(A)(3) when it permitted the City to proceed with its case while the notice of default was in place. The Court of Appeals remanded the case for a determination of whether the default should be set aside. *Wabeke v. City of Holland,* No. 158981 (Mich. Ct. App. August 23, 1994).

On remand, Wabeke argued the default could not be set aside without an award of costs pursuant to MCR 2.603(D)(4). However, Judge Bosman set aside the default

without an award of costs, and again required Wabeke to post a bond. When Wabeke failed to do so, Judge Bosman dismissed the case. In his present complaint, Wabeke states he is in the process of preparing documents to appeal the dismissal of the case to the Michigan Court of Appeals. Complaint, at ¶ 49.

Based on the foregoing, Wabeke alleges Judge Bosman and Mulder conspired to use court procedures to "bury" the merits of the underlying action. Proceeding pro se, Wabeke seeks $5,000,000 in damages.

DISCUSSION

Defendant Mulder's Motion to Dismiss

Wabeke's complaint against Mulder rests on allegations that during the course of the litigation in Case No. 91-15029-CZ, Mulder: (1) brought a motion seeking a bond as security for costs pursuant to MCR 2.109; (2) argued that the default which Wabeke filed when the City failed to respond to interrogatories in a timely manner should be set aside; and (3) argued that plaintiff should not be awarded costs pursuant to MCR 2.603(D) (4), because plaintiff had neglected to move for an order compelling discovery pursuant to MCR 2.313(A) when the City failed to respond to Wabeke's interrogatories.

As Judge Gibson noted in his opinion, federal courts should abstain from hearing "challenges to a state's exercise of its jurisdiction in civil cases if the state's interest is so important that exercising federal jurisdiction would disrupt the comity between federal and state courts." *Mann v. Conlin,* 22 F.3d 100, 105 (6th Cir.), *cert. denied,* 115 S. Ct. 193 (1994) (citing *Pennzoil Co. v. Texaco,*

Inc., 481 U.S. 1 (1987)). In deciding whether to abstain, the Sixth Circuit has directed district courts to examine three factors. The first is whether state proceedings are pending. The second is whether the state proceedings involve an important state interest. The third is whether the state proceedings will afford the plaintiff an adequate opportunity to raise the constitutional claim at issue. *Mann*, 22 F.3d at 105 (citing *Nilsson v. Ruppert Bronson & Chicarelli Co.*, 888 F.2d 452, 454 (6th Cir. 1989)).

With regard to the first factor, plaintiff represents that state proceedings are in fact currently pending. He states that Judge Bosman has issued an order dismissing Circuit Court Case No. 91-15029-CZ, and that Wabeke is in the process of perfecting an appeal.

With regard to the second factor, it is clear that the state proceedings involve an important state interest. The Sixth Circuit has held that a state has an important interest in the proper operation of its judicial system, and that a plaintiff's allegation of conspiracy to deprive him of his legal rights goes to the heart of that interest. *See Nilsson*, 888 F.2d at 454.

With regard to the third factor, it is clear that the Michigan Court of Appeals will afford Wabeke an opportunity to raise the due process claims he alleges. The Michigan Court of Appeals has already granted plaintiff relief on one aspect of his claim.

For these reasons, I conclude that abstention is warranted. Therefore, Defendant Mulder's motion to dismiss on the basis of abstention is GRANTED.

Judge Bosman's Motion To Dismiss

Turning to Judge Bosman's motion to dismiss, Wabeke's complaint rests on allegations that during the course of the litigation in Case No. 91-15029-CZ, Judge Bosman: (1) improperly refused to disqualify himself; (2) continued to issue orders while an MCR 2.603(A)(1) default was in place, violating MCR 2.603(A)(3); (3) set aside the default without awarding costs; and (4) unfairly dismissed plaintiff's lawsuit for failure to post a security bond.

Judges are absolutely immune from monetary damages under section 1983 for their official acts so long as: (1) the judge had subject matter jurisdiction over the case at issue, and (2) the actions taken by the judge were judicial actions. *Stump v. Sparkman,* 435 U.S. 349 (1978); *Pierson v. Ray,* 386 U.S. 547 (1967); *Castorr v. Brundage,* 674 F.2d 531, 537 (6th Cir.), *cert. denied,* 459 U.S. 928 (1982). This immunity applies even where a judge is accused of acting maliciously or corruptly. *Stump,* 435 U.S. at 356.

Here, there is no question of jurisdiction. Plaintiff, who filed the underlying action in 20th Circuit Court, nowhere alleges the circuit court was without jurisdiction. In Michigan, the circuit court is a trial court of general jurisdiction. Mich. Const. Art. IV, § 1. Further, it is clear that Judge Bosman's acts were judicial in nature. The parties dealt with Judge Bosnian in his judicial capacity, and Judge Bosman's acts were functions normally performed by a judge.

An action must be dismissed if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Plaintiff can prove no set of facts which would

entitle him to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). For these reasons, defendant Judge Bosman's motion to dismiss on the grounds of judicial immunity is GRANTED.

Plaintiff's Motion for Summary Judgment

While the above motions were pending before the court, Wabeke filed a motion for summary judgment as to both defendants. Plaintiff bases his motion on the fact that neither defendant filed an answer to his complaint within 20 days of service as required by Fed. R. Civ. P. 12(a).

Defendants were served on July 17, 1995. Pursuant to Fed. R. Civ. P. 6, the 20-day period began to run on July 18, 1995. Because a period cannot end on a Saturday, Sunday, or legal holiday, defendants had until August 7, 1995, to respond. Both defendants filed motions by August 7, 1995, pursuant to Fed. R. Civ. P. 12(b)(6),

It is appropriate to file a Rule 12(b)(6) motion prior to answering the complaint. A responsive pleading is not required to be served until 10 days following a court's denial of the motion. Rule 12(a) (4) (A) .

Consequently, plaintiff's motion for summary judgment is wholly without merit. In light of the disposition of defendants' motions to dismiss, plaintiff's motion for summary judgment is DENIED AS MOOT.

CONCLUSION

For the reasons stated above, Defendant Mulder's motion to dismiss is GRANTED, Defendant Judge Bosman's motion to dismiss is GRANTED, and Plaintiff

Wabeke's motion for summary judgment is DENIED AS MOOT.

/s/ Douglas W. Hillman
Douglas W. Hillman
Senior District Judge

Dated: AUG 25 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE,

Plaintiff,

-vs-

ANDREW J. MULDER and JUDGE CALVIN L. BOSMAN,

Defendants. /

Case No. 4:95-CV-127

HON. DOUGLAS W. HILLMAN

ORDER

In accordance with the opinion filed this date,

IT IS **ORDERED** that defendant Mulder's motion to dismiss is **GRANTED.**

IT IS **FURTHER ORDERED** that defendant Bosman's motion to dismiss is **GRANTED.**

IT IS **FURTHER ORDERED** that plaintiff's motion for summary judgment is **DENIED** as moot.

IT IS **FURTHER ORDERED** that this case is hereby dismissed.

/s/ Douglas W. Hillman
Douglas W. Hillman
Senior District Judge

Dated: Aug. 25, 1995.

PAUL E. WABEKE, Plaintiff-Appellant, v CITY OF HOLLAND, Defendant-Appellee.
No. 207260

COURT OF APPEALS OF MICHIGAN

1999 Mich. App. LEXIS 378

February 23, 1999, Decided

NOTICE:

IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

JUDGES: Before: McDonald, P.J., and Hood and Doctoroff, JJ.

OPINION:

MEMORANDUM.

Plaintiff appeals of right from the trial court order granting defendant's motion for summary disposition and issuing a permanent injunction regarding his filing of further litigation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed an action for injunctive relief seeking to preclude defendant from expending public monies for a certain project. The complaint was the 17th action filed by plaintiff against defendant and other parties since 1979. The trial court denied plaintiff's motion for a preliminary injunction.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), and sought dismissal of the action for the reason that the complaint did not allege that plaintiff

would suffer damage as a taxpayer as a result of defendant's actions. In addition, defendant sought entry of a permanent injunction precluding the circuit court clerk from accepting further pleadings from plaintiff absent prior determination that the verification requirements of MCR 2.114 had been met. The trial court granted the motion for summary disposition and dismissed the complaint. The trial court granted the request for injunctive relief, but excepted any action alleging a personal injury resulting from tortious conduct by defendant or defendant's agents from the requirement that any pleadings filed by plaintiff must be found to be in compliance with MCR 2.114. Finally, the trial court assessed costs in the amount of $500.

On appeal plaintiff, acting in propria persona, argues that the trial court abused its discretion and exceeded its authority by entering the order dismissing the case and imposing sanctions. We disagree and affirm. Entry of the order denying plaintiff's motion for a preliminary injunction did not terminate the case. An order denying a motion for a preliminary injunction is not a decision on the merits of the case. MCR 3.310(A)(2); *Kuizema v. Breen,* 316 Mich 492, 496; 25 NW2d 596 (1947). The order dismissing the complaint constituted the final order in this case.

If a trial court determines that a pleading has been signed in violation of MCR 2.114, imposition of a sanction is mandatory. The determination of an appropriate sanction is within the discretion of the trial court. MCR 2.114(E). We review a trial court's decision regarding the imposition of sanctions to determine if it is clearly erroneous. *Schadewald v. Brule,* 225 Mich App 26, 41; 570 NW2d 788 (1997).

The trial court did not clearly err in determining that sanctions were warranted, and did not abuse its discretion by imposing costs in the amount of $500 and by enjoining the circuit court clerk from accepting any further pleadings from plaintiff without prior approval from a circuit court judge. The trial court found that plaintiff signed the instant complaint in violation of MCR 2.114(D). This suit was the 17th action filed by plaintiff against defendant and other parties since 1979. All previous actions were dismissed. Sanctions were imposed in several cases; however, plaintiff did not pay as ordered. Plaintiff was afforded due process in connection with the imposition of sanctions. See *People v. Herrara (On Remand),* 204 Mich App 333, 339; 514 NW2d 543 (1994). Plaintiff's documented history of filing frivolous actions and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future.

Affirmed.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff

NOT RECOMMENDED FOR FULL-TEST PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit, if cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

No. 03-2235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL E. WABEKE, Plaintiff-Appellant, v. ANDREW J. MULDER, Defendant-Appellee. CALVIN L. BOSMAN, Judge and HARRY BEACH, Judge, Defendants.	)	ORDER (Filed Jun. 17, 2004)

Before: KRUPANSKY and COLE, Circuit Judges; COOK, District Judge.*

Paul E. Wabeke, a Michigan resident proceeding pro se, appeals a district court order dismissing his civil action that sought an order to overturn injunctions issued against him by two state court judges in an effort to deter

* The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

Wabeke from filing frivolous lawsuits. Wabeke has filed a motion for judgment on the pleadings. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Wabeke filed this lawsuit on April 3, 2003, against an Ottawa County Circuit Court Judge (Calvin L. Bosman), an Allegan County Circuit Court Judge (Harry Beach), and a Holland, Michigan City Attorney (Andrew J. Mulder). Defendants Bosman and Beach issued injunctions against Wabeke. Attorney Mulder defended the City of Holland in two lawsuits in which the state courts found that injunctive relief against Wabeke was warranted.

On May 15, 2003, the district court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing Wabeke's claims against them with prejudice. Thereafter, on May 20, 2003, defendant Mulder filed a motion to dismiss, to which Wabeke responded. The district court granted the defendant's motion and dismissed the action pursuant to the provisions of Fed. R. Civ. P. 12(b)(1), concluding that the court lacked subject matter jurisdiction over the claims asserted in the complaint. Wabeke has filed a timely appeal.

We review de novo a district court's decision to dismiss an action for lack of subject matter jurisdiction. *Friends of Crystal River v. United States EPA*, 35 F.3d 1073, 1077-78 (6th Cir. 1994); *Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

Upon review, we conclude that the district court properly dismissed Wabeke's complaint for lack of subject matter jurisdiction. Because Wabeke's complaint merely reflected his dissatisfaction with the permanent injunction issued by the state court regarding his filing of further litigation and essentially sought federal court review of that state court order, the *Rooker-Feldman* doctrine precludes the exercise of federal jurisdiction. *See Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923). The *Rooker-Feldman* doctrine provides that federal district courts generally lack jurisdiction to review and determine the validity of state court judgments, even in the face of allegations that "the state court's action was unconstitutional." *Feldman*, 460 U.S. at 486; *see also Blanton v. United States*, 94 F.3d 227, 233-34 (6th Cir. 1996). Instead, review of final determinations in state judicial proceedings can be obtained only in the United States Supreme Court. 28 U.S.C. § 1257; *Feldman*, 460 U.S. at 476.

Accordingly, the district court's order is affirmed. The motion for judgment on the pleadings is denied. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

NOT RECOMMENDED FOR FULL-TEST PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

No. 95-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL E. WABEKE, Plaintiff-Appellant, v. ANDREW J. MULDER, CALVIN L. BOSMAN, Judge, Defendants-Appellees.	)	ORDER (Filed Oct. 4, 1996)

Before: KENNEDY, DAUGHTREY, and WEIS*, Circuit Judges.

This pro se Michigan litigant appeals a district court order dismissing his civil rights complaint filed pursuant to 42 U.S.C. §§ 1983 & 1988. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously

* "The Honorable Joseph F. Weis, Jr., Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and injunctive relief, Paul E. Wabeke sued the City Attorney for the City of Holland, Michigan (Andrew J. Mulder) and the Circuit Court Judge for Ottawa County, Michigan (Calvin L. Bosman) in their individual and official capacities. Wabeke claimed that the defendants conspired to deprive him of due process of law in his state court suit against the city of Holland.

The district court granted defendants' motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) and denied Wabeke's motion for summary judgment. Wabeke appeals that judgment.

In his timely appeal, Wabeke reasserts the claim he set forth in the district court. In addition, an anonymous author moves to submit an amicus curiae brief, and Wabeke moves for sanctions and costs against defense counsel Douglas Van Essen.

Wabeke's claims are barred by the *Rooker-Feldman* doctrine. Federal courts do not have the authority to review final judgments of the state courts. *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486 (1983). Indeed, federal courts lack jurisdiction to engage in appellate review of state court determinations. *United States v. Owens,* 54 F.3d 271, 274 (6th Cir. 1995); *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993), *cert. denied,* 510 U.S. 1046 (1994). A party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States. *Feldman*, 460 U.S. at 476. A district court engages in impermissible review when it is asked to entertain a claim

that was not argued in the state court but is nonetheless "inextricably intertwined" with the state court judgment. *Wright v. Tackett*, 39 F.3d 155, 157 (7th Cir. 1994) (citing *Ritter*, 992 F.2d at 753). Wabeke's claims are inextricably intertwined with the state court judgment.

Accordingly, we deny the motion by an anonymous author to submit an amicus curiae brief, deny Wabeke's motion for sanctions and costs, and affirm the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

Rule 2.114 Signatures of Attorneys and Parties; Verification; Effect; Sanctions

(A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See *MCR 2.113(A)*. In this rule, the term "document" refers to all such papers.

(B) Verification.

(1) Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit.

(2) If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief." In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B) (2)(b) may be found in contempt of court.

(C) Signature.

(1) Requirement. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.

(2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in *MCR 2.62(A)(2)*. The court may not assess punitive damages.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

PAUL E. WABEKE, Plaintiff, vs. **CITY OF HOLLAND,** Defendant.	**Case No. 02-31220-CZ** **Hon. Harry A. Beach** **JUDGMENT FOR DEFENDANT FOR SUMMARY DISPOSITION, PERMANENT INJUNCTION, AND AWARD OF COSTS**

Paul E. Wabeke, In Pro Per
P.O. Box 1132
Holland, MI 49422-1132

Andrew J. Mulder P26280
P. Haans Mulder P61842
Cunningham Dalman, P.C.
Attorneys for Defendant
321 Settlers Road
Holland, Michigan 49423
(616)392-1821

At a session of the above Court, held in the City of Allegan, County of Allegan, State of Michigan, on this 17th day of May, 20002 [sic].

PRESENT: Honorable Harry A. Beach
Circuit Court Judge

This cause coming on to be heard pursuant to the Motion for Summary Disposition of the Defendant, City of Holland, pursuant to MCR 2.116(C)(8) seeking to dismiss the Complaint of the Plaintiff for failure to state a cause of action; requesting the issuance of a permanent injunction

pursuant to MCR 2.114(E); and the award of costs for frivolous and vexatious proceedings by the Plaintiff; the Court having reviewed the Motion and Brief filed by the Defendant, the response of the plaintiff, the oral arguments of the Plaintiff and the Defendant, and the Court having rendered its verbal opinion on April 26, 2002;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That the Complaint of the Plaintiff is hereby dismissed, with prejudice pursuant to MCR 2.116(C)(8) for failure of the Plaintiff to state a cause of action. The Court specifically finds that the Complaint filed by the Plaintiff is frivolous.

2. That a permanent injunction is hereby issued precluding the Allegan County Clerk from accepting any litigation filed by the Plaintiff against the Defendant, City of Holland, any of its officials or any of its agents who have aced in their capacity as agents or officials for the City of Holland until the Complaint of the plaintiff has been reviewed by the presiding judge for the County of Allegan for compliance with MCR 2.114(D) and upon receipt or evidence of a receipt to the Allegan County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically excepted from this permanent injunction is any cause of action by the plaintiff which cites a personal injury arising from the tortious conduct by the Defendant, its officials or agents, which results in personal injury to the Plaintiff himself or to any of his property.

3. That costs are assessed in the amount of $500 against the Plaintiff and in favor of the Defendant in this cause.

HARRY BEACH
Harry A. Beach,
Circuit Court Judge

Supreme Court, U.S.
FILED
MAR 10 2005
OFFICE OF THE CLERK

(3)

No. 04-953

In The
SUPREME COURT OF THE UNITED STATES

PAUL E. WABEKE,
Petitioner

v

ANDREW J. MULDER,
Respondent

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

PETITION REPLY BRIEF

By:
Paul Wabeke, *pro se*
PO Box 1132
Holland, Mi. 49423-1132

March 2005

TABLE OF CONTENTS

Index of Authorities ii

1. THE 1ST AM., 14TH AM., PETITIONER AND OTHER *PRO SE* LITIGANTS NEED THIS COURT'S PROTECTION, BECAUSE THEY HAVE NO OTHER PROTECTION. 1

2. ROOKER-FELDMAN SHOULD BE REVISITED FOR COMPELLING REASONS. 2

A. Rooker-Feldman Demands Review Because It Effectively Reversed 200 Year Old Precedent Establishing Collateral Review By Federal Courts Of State Court Decisions. 2

B. Rooker Feldman Increases Costs For Pro Se Plaintiffs And Denies Resolution Of Important Issues. 3

C. The Rooker-Feldman Doctrine Appears To Conflict With 28 USC 1343. 3

D. Rooker-Feldman Deprives Pro Se Litigants Of A Decision On Whether The State Judge Was Biased, Incompetent Or Engaged In Conspiracy With Government Agents. 4

3. THE COURT SHOULD DECIDE WHEN FALSE STATEMENTS BY GOVERNMENT ATTORNEYS AND AGENTS IN CIVIL CASE VIOLATES DUE PROCESS OF LAW. 5

4. THIS COURT SHOULD CLEARLY DEFINE "FRIVOLOUS" LAWSUITS IN ACCORD WITH THE ABSOLUTE RIGHT TO PETITION PROTECTED BY THE FIRST AMENDMENT AND APPLY STRICT SCRUTINY. 8

CONCLUSION 10

INDEX OF AUTHORITIES

Declaration of Independence	4
First Am.	-1,2,8,9,10
6th Am.	4
14th Am.	1,2
28 USC 1343	4
42 USC 1983	2,7
BE & K Construction Co. v NLRB, 536 US 516 (2002)	9
Elliott v Lessee of Perisol, 28 US 328 (1828)	3
England v Louisiana St. Brd Med. Exam., 375 US 411 (1964)	3
Exxon-Mobil v Saudi Basic, #03-1696, cert granted)	8,9
Feldman v US, 322 US 487, 501-502 (1944)	1
Gertz v Robert Welch, Inc., 418 US 323, 340 (1974)	6
Grant v Moles, (unpubl, #94-1107, 7th Cir 1995)	2
Grievance Administrator v Rostash, 457 Mich 289; 577 NW2d 452 (1998).	6
Hoagland v Sandberg, 385 F3d 737, 739, 740 (7th Cir 2004)	3
In re: Judge Noecker, (MSC #124477, 2005)	6
In re Thomas, 441 Mich 1206	
Lachance v Erickson, 522 US 262 (1997)	6
Rooker v Fidelity Trust Co., 263 US 413 (1923)	3
State Bar Grievance Adm. v Markowitz, 393 Mich 6; 222 NW2d 504 (1974)	6
Tumey v Ohio, 273 US 510 (1927)	4
US v Recio, 537 US 270, 279 (2003)	5
Wolf v Strankman, 02-15720, 9th Cir, 2004)	2
Rule 42	9
ABA Journal, Feb. 2005,	2
Leviathan: The Growth of Local Government and the Erosion of Liberty, by Clint Bolick (Laissez Faire Books)	5
agcmi.com/#About	7

Respondent does not provide any reason why the substantial issues raised by the Petition should not be decided by this Court. In reply, Petitioner believes that the issues should be decided for the following reasons.

1. THE 1ST AM., 14TH AM., PETITIONER AND OTHER *PRO SE* LITIGANTS NEED THIS COURT'S PROTECTION, BECAUSE THEY HAVE NO OTHER PROTECTION.

The Petition and Response prove Petitioner, and other *pro se* litigants, are an *oppressed* minority. For that reason alone this case deserves review.

> "The founders of our federal government were too close to *oppressions* and *persecutions of the unorthodox, the unpopular, and the less influential,* to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments [the Bill of Rights], designed as a whole to "*limit* and qualify the *powers of Government,*" to define "cases in which the Government ought not to act, or to act only in a particular mode", and to *protect unpopular minorities from oppressive majorities.* 1 Annals 437." (emphasis added) *Feldman v US,* 322 US 487, 501-502 (1944) dissent by Justice Black.

Petitioner believes that the First Am. right to petition is absolute and it applies equally to *pro se* litigants via the 14th Am. Equal Protection Clause. However, both are violated in this case.

It is evident from both parties filings that *pro se* litigants are being repeatedly enjoined from, and persecuted for, exercising their protected rights by judges all across America, some even requiring huge oppressive prefiling bonds. Resp. 23-24. (fn 1 See also

The Michigan Bar in a recent survey of state courts found that in many of the state courts citizens represented themselves from 0 to 100% of the cases.

According to the President of the ABA, *43 million* Americans are eligible for some Legal Services Corp. assistance, likely because of low income. (*ABA Journal*, Feb. 2005, p 6, President's Message, "Justice for all.") But that does not mean all of the poor have that resource. Many are not aware of it. Others cannot find an attorney. How many end up representing themselves?

Compare Petitioner's income - $800 *per month* - to what Respondent charges *per hour* - $102.50. (Pet. p 29-30; Resp. p 29-30) Is there desparity here? Are *pro se* litigants at a severe disadvantage?

In *Grant v Moles*, (unpubl, #94-1107, 7th Cir 1995) a *pro se* 42 USC 1983 case, a black driver was ticketed, allegedly for speeding, but contended the police had a policy of targeting black drivers with bogus traffic violations. He was barred a federal court decision on the merits by *Rooker-Feldman*.

In *Wolf v Strankman*, 02-15720, 9th Cir, 2004) a *pro se* cab driver has been barred from filing *pro se* lawsuits *by a California law* in effect since 1963. The district court said he could not challenge it because of *Rooker-Feldman*, but the 7th Cir. reversed.

If these oppressions of protected rights are allowed to continue, any and all rights may be oppressed by judical injunctions or lawmakers will. The 1st Am., 14th Am. and other rights will be remembered as whimsical illusions. All the issues raised by the Petition are ripe for decision.

2. ROOKER-FELDMAN SHOULD BE REVISITED FOR COMPELLING REASONS.

A. Rooker-Feldman Demands Review Because It Effectively Reversed 200 Year Old Precedent Establishing Collateral Review By Federal Courts Of State Court Decisions.

In 1828 this Court decided in *Elliott v Lessee of Perisol,* 28 US 328 (unanimous) that state court litigants who unjustly lost property had a right to a collateral decision in the federal courts on the issue. That was one hundred years *before Rooker v Fidelity Trust Co.,* 263 US 413 (1923). *Elliott* throws substantial doubt on the validity of *Rooker-Feldman* and of its own weight is substantial reason to revisit it.

In *Elliott,* there was a direct challenge to the lower federal court jurisdiction of the case in a state property rights case involving a clerk who altered property deed filings without authority. The *Elliott* Court unanimously upheld the *right to collateral review in federal courts of the state court decisions.* Plus, *Elliott* not only cast doubt on the state court judgment, but affirmed the judgment of the lower federal court who had heard the case.

B. Rooker Feldman Increases Costs For *Pro Se* Plaintiffs And Denies Resolution Of Important Issues.

Circuit Judge Posner accurately has stated that litigating jurisdictional questions, such as those in *Rooker-Feldman,* has a high cost for the parties and the courts. *Hoagland v Sandberg,* 385 F3d 737, 739, 740 (7th Cir 2004) The truth is most poor and *pro se* litigants cannot afford multiple appeals and some not even one.[1]

---

[1] "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled - absent unique and rare situations - to adjudication of their rights in the tribunals which Congress has empowered to act." ***England v Louisiana St. Brd Med. Exam.***, 375 US 411, 425, 11 L Ed 2d 440, 84 S Ct 461 (1964) (Justice Douglas quoting his

This cost is minimal however, compared to the costs of lost of faith in the judiciary branch to enforce the Constitution and government in general by large portions of this Country. (Waco, Ruby Ridge, Oklahoma)

C. The Rooker-Feldman Doctrine Appears To Conflict With 28 USC 1343.

28 USC 1343 clearly grants the federal district courts broad jurisdiction to hear civil rights complaints. It makes no distinction as to whether the civil rights violation occurred within a state case or outside of a state case, whether by a state judge, state lawyer, state clerk or federal janitor. Petitioner claims the jurisdiction of 28 USC 1343, and hereby moves to amend his pleadings to so include it.

D. Rooker-Feldman Deprives *Pro Se* Litigants Of A Decision On Whether The State Judge Was Biased, Incompetent Or Engaged In Conspiracy With Government Agents.

It has long been intended that litigants, including state litigants, are entitled to a decision by impartial decision makers. Declaration of Independence (jury); 6th Am. ("impartial jury"); *Tumey v Ohio*, 273 US 510 (1927) (unbiased judge). But *Rooker Feldman* is a total blockade to such determinations, when the state courts refuse to decide the issue.

Respondent submitted the evidence and it deserves exposure so this Court can decide whether *Rooker-Feldman* should be revisited. Both parties have referred to a previous lawsuit filed by Petitioner against Respondent *and Judge Bosman* that was dismissed by the district court *without any reference to Rooker-Feldman*. (Resp. App 20-27) However, it was affirmed by the 6th Cir. based on *Rooker-Feldman*. (Resp. App 34-36) The 6th Circuit decision states: "Wabeke claimed that the *defendants conspired to deprive him of due process of law in his state court suit* against the city of Holland." (emphasis

---

dissent in ***Clay v Sun Ins***. 263 US 207, 228 ( ) and lamenting his approval of the abstention doctrine.)

added) (Resp. App 35) They then affirmed based on *Rooker-Feldman*, ignoring the conspiracy and violations of due process of law. [2]

Due to these and other experiences Petitioner has little faith in the impartiality of federal district and appellate courts when issues of state judicial bias are raised by *pro se* litigants. Petitioner believes there is substantial prejudice against *pro se* litigants within this circuit, at least. (See Pet. Aff. at p 29-30)

3. THE COURT SHOULD DECIDE WHEN FALSE STATEMENTS BY GOVERNMENT ATTORNEYS AND AGENTS IN CIVIL CASE VIOLATES DUE PROCESS OF LAW.

Martha Stewart just finished serving 5 months in prison for *lying* about a stock sale *to investigators*. But does the Commandment "Thou shall not lie" apply to government attorneys and agents in court proceedings, or only to the People? Should *pro se* litigants habitually be the losers because of lying government lawyers, agents and biased judges who refuse to consider the truth? (Pet. Aff p 29-30) Are government officials "required to turn square corners" or allowed to take unjust short cuts? *US v Recio*, 537 US 270, 279 (2003) (J. Stevens dissent).

It is well documented that in recent decades state and local public official powers have grown exponentially with virtually no accountability or limits. See *Leviathan: The Growth of Local Government and the Erosion of Liberty*, by Clint Bolick (Laissez Faire Books). Petitioner has attempted in the small ways he could - filing lawsuits - to provide some local limits and accountability. But in doing so, he has encounter devilish resistance and retaliation, much of it public. Respondent and dismissed state judges have been a part of the problem.

Respondent admits to being a lawyer for 29 years and being part of a private law firm representing the City of

---

[2] To read more about the conspiracy and state appeals court action see Resp. App 20-22)

Holland. (Resp. ii, 30) He might even be a member of this Court's bar. But his integrity is in question because of deceptions in state and federal courts relative to this case. In fact, Petitioner believes he has attempted to mislead even this Court. Is he allowed, because of his high office, to make false statements in order to violate a citizens rights and/or retaliate? Thus far he has been. He has *Rooker-Feldman* absolute immunity.

Other than an a biased or unethical judge, there are few officials that can damage a person's rights in judicial proceedings more than a lying deceptive government attorney or official. *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974) said "there is no constitutional value in false statements of fact." Known false statements in Court asserting facts or the law hinders justice. Obstructing justice violates the law.

An unethical government attorney damages not only the individual opponent, but also the law. Bad precedents are set by decisions unjustly obtained, as this one was. Plus there are no easy ways to reverse them.

> "To *deceive the court* is to undermine its very foundations, for it is a tenet of our judicial system that lawyers are officers of the court." (emphasis added) *State Bar Grievance Adm. v Markowitz*, 393 Mich 6, 12; 222 NW2d 504 (1974).

Like the Michigan Supreme Court said, this Court's "paramount concern must always be to safeguard the public. *In the Matter of Trombly*, 398 Mich 377, 382; 247 NW2d 873 (1976)" *Grievance Administrator v Rostash*, 457 Mich 289, 298; 577 NW2d 452 (1998).

In re: Judge Noecker, (MSC #124477, 2005) the judge was fired in part for *lies* to the JTC. [3] In *Lachance v Erickson*, 522 US 262; 118 S Ct 753; 139 L Ed 695 (1997) this Court held that the right to be heard in non judicial proceedings does not include the right to make false statements.

The misconduct of an opposing attorney in a case has extremely limited remedies. Generally it can only be addressed by the sitting judge, provided he is inclined to do something, which is not likely, especially when a *pro se* litigant is making the complaint. On appeal, the appellate court can either ignore the issue or address the misconduct when raised. Typically in *pro se* cases as here, the state court of appeals ignored it. If the misconduct is not addressed, the damage done in the case becomes permanent, even if an attorney grievance is filed. The only possible exception is if a collateral civil rights suit may be brought against the unethical attorney in federal court under 42 USC 1983.

In Michigan lawyers are rarely and lightly disciplined by the State Bar and Supreme Court. According to the Michigan Attorney Grievance Commission, 3373 grievances were filed in 2000, but only 126 (3.7%) resulted in any orders of discipline. (See agcmi.com/#About)

> "Since 1985, only former Judge James Del Rio has been denied reinstatement. Seventy lawyers have been reinstated, including lawyers who have *embezzled* and *misappropriated their clients money*, and who have *lied* and *cheated*." See 441 Mich Rep. at 1214.

In addition, an attorney grievance complaint is totally ineffective relief for the *pro se* litigant. First, it does not reinstate the case, even if the complaining party should prevail and the attorney is held accountable. Secondly, since in Michigan and elsewhere attorneys are "self governing", the probability of a *pro se* litigant getting any sort of relief is unheard of. Third, the whole process is encased in secrecy. Fourth, without the state having any licensing scheme for attorneys, unethical attorneys are totally free to continue unethical practices without consequences. Petitioner is not aware of any *pro se* complaint resulting in any discipline.

Without any effective check, such as this civil rights lawsuit for damages, such attorneys have free rein to violate *pro se* citizens. *Rooker-Feldman* thus blocks the only truly

effective form of relief - a civil rights lawsuit in federal court. *Rooker-Feldman* in effect grants absolute immunity, via the backdoor, to unethical attorneys and assures them the protection of the federal courts also.

4. THIS COURT SHOULD CLEARLY DEFINE "FRIVOLOUS" LAWSUITS IN ACCORD WITH THE ABSOLUTE RIGHT TO PETITION PROTECTED BY THE FIRST AMENDMENT AND APPLY STRICT SCRUTINY.

President Bush has said he is attacking "frivolous" lawsuits and supposedly has signed a law to move them to federal court. But his definition is vague and overbroad, mostly covering large class action suits against corporations.

Respondent continues to oppressively and deceptively allege Petitioner files frivolous lawsuits. He and his attorney allege even this Petition is frivolous and seek monetary relief. Resp. p 29-30. Perhaps, as an included question, this Court should strictly define "frivolous" in relation to this First Amendment case and for the protection of severely oppressed *pro se* litigants. It is a term that is much blown about by hot aired attorneys, and often judges, bent upon retaliation and silencing the critical and whistleblowing speech of *pro se* opponents exposing injustice and corruption. Furthermore, maybe the Court should examine the state procedure where false information, submitted by Respondent, and questionable process was utilized to secure these unjust state injunctive orders.

In defense against Respondent's charge of frivolousness in this Petition, the Court is well aware that corporate giant *Exxon-Mobil* (*v Saudi Basic*, #03-1696, cert granted) has recently challenged the wholesale expansion of *Rooker-Feldman*.

Respondent also *falsely* claims that there is no conflict between the circuits on *Rooker-Feldman*. (See Resp. p 10-17) But the truth is, as pointed out in the *Exxon* petition, there is indeed conflict. (See *Id.* p 20-) In fact, this Court has accepted the case to decide that issue.

Plus, judicial note should be made that *Exxon* has never been enjoined from exercising its First Am. right to petition, and certainly not for 7 years, as Petitioner has. The unanimous decision in *BE & K Construction Co. v NLRB*, 536 US 516 (2002) proves this challenge is not frivolous either.

Obviously, Petitioner does not have opportunity here to fully or fairly defend himself. However, Respondent has supplied information that leads to the conclusion that not all of his state litigation has been frivolous, as alleged, either. A federal district judge noted that Petitioner won in a small measure at the Michigan Court of Appeals in his previous federal civil rights case. (Resp. App 21-22.) That small short lived win was tempered, however, by the subsequent unjust dismissal of that federal civil rights suit against Respondent and the same state judge who later issued the first injunction relevant here. Resp. 20-27. Subsequently, the 6th Circuit invoked *Rooker-Feldman* to bury the case. Resp. App. 34-36.

How can a *pro se* litigant, often poorly educated and without law resources, prove his case is not frivolous with a biased and/or incompetent and retaliatory judges who dismisses the case without attempting to decide the merits?

The net effect is that *pro se* litigants have *no just opportunity* whatever to prove their case or challenge biased state judges or unethical state attorneys who inflict injustice on the People by lies, judicial misconduct, conspiracies, etc. That is not what the Founders and People intended.

In *BE & K Construction Co. Id.* this Court reversed the 6th Circuits affirmance of retaliation in relation to the NLRB and union/employer lawsuits based on the First Amendment right to petition. Similar standards should be imposed for the First Amendment protections of Petitioner and all other *pro se* litigants.

Perhaps also this Court should amend its Rule 42 to *equally* include respondents who file frivolous and/or misleading answers to petitions, as shown here. Maybe then *pro se* petitioners will find a little justice.

CONCLUSION

This case is Goliath v David. The "leviathan" government bullies v the weak *pro se* minority. It reveals, in small part, that *pro se* litigants are a severely oppressed minority destined to perpetual defeat in the judicial arenas. Respondent would like this Court to strike the last nail in the coffin of *pro se* litigants Constitutional rights - *all* of them - by refusing to review the First Am., *Rooker-Feldman Doctrine* and other issues in this case. Petitioner requests that the Court decide the important issues raised by this case in favor of the Constitution and those it was intended to protect.

Paul E. Wabeke
PO Box 1132
Holland, Michigan 49423-1132

(4)

Supreme Court, U.S.
FILED
APR 15 2005
OFFICE OF THE CLERK

No. 04-953

In The
SUPREME COURT OF THE UNITED STATES

PAUL E. WABEKE,
Petitioner

v

ANDREW J. MULDER,
Respondent

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

MOTION FOR REHEARING

By:
Paul Wabeke, *pro se*
PO Box 1132
Holland, Mi. 49423-1132

April, 2005

QUESTIONS

1. Whether, under Due Process and Equal Protection of Law, the petition in this case should be granted and the case remanded for consideration in light of *Exxon Mobil v Saudi Basic*, 544 US ____ as in the other *Rooker-Feldman* cases of *Blaisdell v Rochester, N.H.*, (#04-1) and *Holloway v Ar. State Bd. of Architects*, (#04-745)?

2. Alternatively, where a state judge has terminated the First Am. rights of Petitioner, a state plaintiff, whether the collateral action authorized by the 14th Am. and civil rights acts - 42 USC 1983, etc. - fall within *Exxon Mobil* as exceptions to *Rooker-Feldman* which Congress may authorize?

TABLE OF CONTENTS

QUESTIONS i
INDEX OF AUTHORITIES iii
JURISDICTION 1
FACTS 1
REASONS FOR GRANTING THE MOTION FOR REHEARING 2

1. UNDER DUE PROCESS AND EQUAL PROTECTION OF LAW CERTIORARI SHOULD BE GRANTED AND THIS CASE REMANDED TO THE 6TH CIRCUIT FOR FURTHER PROCEEDINGS CONSISTENT WITH *EXXON MOBIL v SAUDI BASIC IND. CORP.* 2

2. ALTERNATIVELY, CERTIORARI SHOULD BE GRANTED AND A DECISION MADE WHETHER CIVIL RIGHTS ACTIONS AUTHORIZED BY THE PEOPLE IN THE 14TH AMENDMENT, AND SINCE BY CONGRESS, ARE EXEMPT FROM *ROOKER-FELDMAN* IN ACCORD WITH *EXXON MOBIL v SAUDI BASIC IND. CORP.* 4

CONCLUSION 6

INDEX OF AUTHORITIES

First Amendment	i,1,6
14th Amendment	i,4
28 USC 1343	5
28 USC 1653	5
42 USC 1983	i,4,5
BE & K Construction Co. v NLRB, 536 US 516 (2002)	2
Blaisdell v Rochester, NH, (#04-1), 544 US _____(2005)	3
England v Louisiana St. Brd Med. Exam., 375 US 411, 425 (1964)	5
Exxon-Mobil v Saudi Basic, (#03-1696) 544 US _____ (2005)	1,2,3,4,5
Holloway v Ar. State Bd. of Architects (#04-745) 544 US _____ (2005)	3
Rooker-Feldman	all
Silverman v Silverman, 338 F.3d 886, 893 (2003)	5

JURISDICTION

Certiorari was denied on March 21, 2005. Rehearing is timely when mailed on or before April 15, 2005. Rule 44.

FACTS

On the merits, this is a First Amendment civil rights case attempting to protect Petitioner's freedoms, his right to petition, speak critically and expose fraud, waste and corrution in local government. But Petitioner has been *permanently enjoined* from doing so in state courts by false and misleading allegations and summary process. He would like his rights restored.

Like *Exxon-Mobil v Saudi Basic*, #03-1696, the district court originally dismissed this case for lack of subject matter jurisdiction citing *Rooker-Feldman* and 6th Circuit cases. See Pet. Appendix C, at 12a-14a.

On appeal the 6th Circuit affirmed based on *Rooker-Feldman*. See Appendix A, at 1a - 3a.

A timely petition for writ of certiorari was submitted raising 4 questions, the second of which sought to challenge *Rooker-Feldman*. [1]

At the time this Petition was submitted Petitioner was not aware that this Court had granted certiorari in *Exxon-Mobil v Saudi Basic*, #03-1696, which also challenged the *Rooker-Feldman Doctrine*.

After the petition was filed, Petitioner discovered that *Rooker-Feldman* was being challenged in the *Exxon Mobil v Saudi Basic Ind. Corp. No. 03-1696*. Subsequently, in his Reply *Exxon Mobil* was referenced. (See Reply, p 8, 9)

---

[1] The question presented was:
2. Whether the *Rooker-Feldman Doctrine* should be revisited when [where] it is clear [in this case] that the First Am. "right to petition . . for redress of grievances" *pro se* cannot be protected in state or lower federal courts?

However, despite this common ground, this Petition was denied certiorari on March 21, 2005.

On March 30, 2005 the *Exxon Mobil* decision was made reversing the 3rd Circuit Court of Appeals.

But by then this case was dead.

Petitioner now moves for rehearing.

There are ample reasons and distinctions from *Exxon* that warrant an independent review to prevent further injustice. First, Respondent Mulder was *never a party* in the state case. By his own admission his only involvement was as an attorney for the City of Holland. (Pet. Resp. at ii, 26-27, 30) Second, Mulder secured the permanent injunction against Petitioner, without regard for Petitioner's civil rights or the truth of the facts he asserted. Third, in contrast to *Exxon Mobil*, this is a civil rights case involving a violation of the First Amendment by a state court - by imposing a permanent injunction against Petitioner filing lawsuits against local government - an injunction never expressly endorsed by this Court. Oppositely, the First Am. right of petition *was* protected for corporations in *BE & K Construction Co. v NLRB*, 536 US 516 (2002). *Rooker-Feldman*, as applied below, prohibits a federal challenge to this civil rights violation.

REASONS FOR GRANTING THE MOTION FOR REHEARING

1. UNDER DUE PROCESS AND EQUAL PROTECTION OF LAW CERTIORARI SHOULD BE GRANTED AND THIS CASE REMANDED TO THE 6TH CIRCUIT FOR FURTHER PROCEEDINGS CONSISTENT WITH *EXXON MOBIL v SAUDI BASIC IND. CORP.*

This case challenged *Rooker-Feldman* and was docketed while the case of *Exxon Mobil v Saudi Basic Ind. Corp., No. 03-1696* was pending decision on the same issue. See Petition Question 2, p i ; fn 1 here.

In two other petitions involving *Rooker-Feldman*, filed before the decision in *Exxon Mobil v Saudi Basic Ind. Corp., No. 03-1696*, the court granted certiorari and remanded to the respective courts of appeals. See O4-1, *Blaisdell v Rochester, NH*; 04-745, *Holloway v Ar. State Bd. of Architects*. (See certiorari - summary dispositions of April 4, 2005.)

Due Process and Equal Protection of the Law would provide that the same result should apply in this case. [2]

Secondly, as admitted by Respondent in this case, the Respondent was *only* involved in the state case as an attorney for the City of Holland - the opposing council to Petitioner Wabeke, who was *pro se*. (See Resp. p ii, 26-27, 30). Respondent Mulder was *not* a party in any respect whatsoever. Yet Respondent deceptively claimed *Rooker-Feldman* protection and lack of subject matter jurisdiction at the District Court. (See Mot. Dis. p 1, Brief p 6-7)

This fact is in stark contrast to *Exxon Mobil v Saudi Basic Ind. Corp., No. 03-1696*, where both parties were in state and federal courts.

For these reasons Petitioner believes rehearing should be granted, certiorari granted and the lower court decisions vacated and the case remanded.

However, he would be more pleased with an alternative - granting certiorari and deciding the merits.

---

[2] Petitioner wonders why his petition was not held pending the *Exxon Mobil* decision? Was it because he is *pro se*?

2. ALTERNATIVELY, CERTIORARI SHOULD BE GRANTED AND A DECISION MADE WHETHER CIVIL RIGHTS ACTIONS AUTHORIZED BY THE PEOPLE IN THE 14TH AMENDMENT, AND SINCE BY CONGRESS, ARE EXEMPT FROM *ROOKER-FELDMAN* IN ACCORD WITH *EXXON MOBIL v SAUDI BASIC IND. CORP.*

In the recent unanimous decision in *Exxon Mobil* this Court held that Congress has authority to make exceptions to *Rooker-Feldman*, if it decides to.

> "Congress, if so minded, may explicity empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions. 28 U.S.C. 2254(a)."
> (See *Exxon*, fn 8.)

Petitioner believes that the civil rights acts - 42 USC 1983, etc. - authorized by the 14th Amendment sec 5 are long existing exceptions to *Rooker-Feldman*, equal to that of habeas corpus, but in a civil context.

Petitioner would like this issue to be decided now, since he is elderly, 84, and his good name and reputation are at issue. Petitioner does not have many years left to clear his name and reputation of the black spots wrongly and maliciously placed upon him by Respondent in the form of permanent injunctions against filing lawsuits in state courts. Furthermore, he has little faith that the 6th Circuit will reach a just decision on the merits, which he has a right to expect, should the case be remanded. In addition, Petitioner has little money to pursue additional appeals. (See Pet. Affidavit at p 29). [3]

---

[3] "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice." Justice Douglas quoting his

Secondly, *10 years ago* the 6th Circuit invoked *Rooker-Feldman* to bar Petitioner an appeal by right decision on the merits in a distinct previous 42 USC 1983, etc., civil rights suit against Respondent Mulder. Then, as now, Respondent was not even a party to the state suit. (See Respondent's Appendix, p 34-36.) Respondent was, as in the related state case here, only an attorney in the state case.

Third, the 6th Cir and lower courts have dismissed many civil rights cases based on *Rooker-Feldman*, most are unpublished. Some where the poor plaintiffs could not afford the money and time to appeal, especially not all the way to this Court, in contrast to the *Exxons*, and *Saudi's* of this world. (For example *Wabeke v Mulder*, 95-2099, at Respondent's Appendix p 34-36) Every year many 1,000's of civil rights cases are filed. It will be necessary that all of them file appeals, if they can afford it, to decide at the courts of appeals whether the civil rights actions are exceptions to *Rooker-Feldman* under *Exxon*. How many will not be able to afford it and lose a valid case? Then there will be more appeals to this court, which many will not be able to afford. See fn 3.

Fourth, 28 USC 1343 clearly grants the federal district court broad jurisdiction to hear civil rights complaints. It makes no distinction as to whether the civil rights violation occurred within a state case or outside of a state case, whether by a state judge, state lawyer, state clerk or other state employee. Petitioner claims the jurisdiction of 28 USC 1343, and hereby moves to amend his pleadings to so include it. 28 USC 1653.

Fifth, at least one court of appeals has stated "applying" *Rooker-Feldman* "has proven to be both *complex and difficult*." (emphasis added) *Silverman v Silverman*, 338 F.3d 886, 893 (2003). That is another reason to review and reverse.

---

dissent in *Clay v Sun Ins.* 363 US 207, 228 (1960) in *England v Louisiana St. Brd Med. Exam.*, 375 US 411, 425 (1964). The same applies to appeals.

Lastly, there has to be some way that state judicially imposed injunctions may be challenged in federal court when the Constitution via the First Amendment clearly protects the right. Petitioner believes it is under the civil rights laws.

CONCLUSION

For these reasons Petitioner requests that the petition for writ of certiorari be granted and a decision be made on the merits.

Respectfully submitted,

_____

Paul E. Wabeke

April 15, 2005

CERTIFICATION OF PETITIONER

Petitioner states and affirms that this motion for rehearing complies with the intent of Rule 44(2) and is presented in good faith and not presented for purposes of delay.

_____

Paul E. Wabeke

April 15, 2005